In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. [redacted] 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioner,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California.

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Appendix A

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE I

Section 9

No Bill of Attainder or ex post facto Law shall be passed.

Section 10

No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.

ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

FEDERAL STATUTES

Internal Security Act of 1950

50 U.S.C. Sec. 781

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

(1) There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

* * * * * * *

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is

vested the direction and control of the world Communist movement.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

50 U.S.C. Sec. 784 (a)

When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there

is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

• • • • • • • • •

(C) In seeking, accepting or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

• • • • • • • • •

50 U.S.C. Sec. 784 (b)

The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

Communist Control Act of 1954

50 U.S.C. Sec. 841

Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limita-

tion as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Labor Management Relations Act, 1947

29 U.S.C. Sec. 151

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. Sec. 157

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

29 U.S.C. Sec. 158 (a)

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • • • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization. . . .

STATE STATUTES

California Government Code, Sec. 1027.5
(Stats. 1953, ch. 1646, Sec. 1)

The Legislature of the State of California finds that:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law . . .

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with the endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement. . . .

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict,

interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California . . ."

California Government Code, Sec. 1028
(Stats. 1947, ch. 1418, Sec. 1)

It shall be sufficient cause for the dismissal of any public employees including teachers in the public schools or any state supported educational institution, when such public employee or teacher advocates or is a member of an organization which advocates overthrow of the Government of the United States or of the State, by force, violence, or other unlawful means.

California Penal Code, Sec. 11400
(Stats. 1919, ch. 188; codified 1953)

"Criminal syndicalism" as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

California Penal Code, Sec. 11401 (Ibid.)

Any person who:

(1) By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime,

sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

(2) Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

(3) Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment or, or advising, criminal syndicalism; or

(4) Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid in and abet criminal syndicalism; or

(5) Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years.

Appendix B

American Arbitration Association, Administrator
Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
Cutter Laboratories
and
Bio-Lab Union of Local 225
United Office and Professional
Workers of America

Award of Arbitrators

We, the Undersigned Arbitrators, having been designated in accordance with the Collective Bargaining Agreement entered into by the above named Parties, and dated July 23, 1948 as amended, and having been duly sworn and having duly heard the proofs and allegations of the Parties, Award, as follows: Annexed hereto and made a part hereof is the Award consisting of thirty-seven (37) pages.

Dated at San Francisco, California September 16th, 1950.

State of California,
City and County of San Francisco.—ss.

On this 16th day of September, 1950, before me personally appeared Hubert Wyckoff, Paul Heide and J. Paul St. Sure, to me known and known to me to be the individuals described in and who executed the foregoing instru-

ment and they acknowledged to me that they executed the same.

E. D. Conklin
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Feb. 22, 1953

Case No. L-6463, NYB-L-14-50

Award

Cutter Laboratories and Bio-Lab Union of Local 225 United Office and Professional Workers of America are in dispute over the discharge of Doris Walker. She was employed by the Company October 10, 1946 to perform clerical work, first as Label Clerk in the Production Planning Department and then as Clerk Typist in the Purchasing Department. She was discharged October 6, 1949.

The parties were heard July 26, 27, 28, and August 2, 3, 4, 1950 by a board of three arbitrators duly constituted by stipulations of the parties under the auspices of the American Arbitration Association. All witnesses were duly sworn. The appearances were: on behalf of the Company, Gardiner Johnson and Thomas E. Stanton, its attorneys; and on behalf of the Union, Edises & Treuhaft by Bertram Edises, its attorneys. The evidence showed and it was stipulated by the parties that all of the preliminary procedural requirements to the arbitration had been met, those specified in the collective bargaining agreement and also in the rules of the American Arbitration Association.

Upon consultation among us and upon consideration, we find and award as follows:

1. *The collective bargaining agreement dated July 23, 1948.*

The pertinent portions of the collective bargaining agreement in effect when the discharge took place are:

"*Article I. Recognition and Union Security*

Section 3. The Company agrees that it will not interfere with, restrain or coerce said employees because of membership or lawful activity in the Union nor will it attempt to discourage membership in the Union by discrimination in respect to hiring, tenure of employment or any other term or condition of employment."

"*Article VIII. Discharges and Layoffs*

Section 1. No employee shall be discharged except for just cause. The provisions of this section shall not apply to personnel reductions for lack of work or to effect economies.

In the event an employee is discharged without just cause, he shall be reinstated without loss of pay, seniority, or other benefit, subject to the following limitations:

In case of reinstatement, the total back pay award allowable shall be limited to the full time regular pay of the employee for the period he was off the payroll, or a period of eight (8) weeks, whichever period is the shorter, less any gross earnings or unemployment compensation received or earned during such period.

The employee shall make every reasonable effort to minimize his damages by seeking and obtaining gainful employment during the period he is off the payroll, and any back pay award shall not include any time during which the employee has failed to meet this obligation. If the employee is disabled by sickness or injury during any part of such period, his rights during such period of disability shall be limited to the sick leave benefits to which he would have been entitled if he had remained on the payroll.

Section 2. The Company agrees that no employee shall be discharged for general inefficiency or low standard of work unless he had been warned of his shortcomings a reasonable period of time in advance in order to afford him an opportunity to correct them. This limitation shall not apply in case of flagrant misconduct on the part of the employee.

Section 3. Except in cases mentioned in the preceding section, an employee whose name is on the seniority list shall be given written notice of dismissal, stating the reasons for his termination two (2) weeks before the termination of his pay. A copy of any such notice shall be delivered to the Union without delay."

Article X, Section 1 of the agreement contains a mutual agreement not to discriminate against "a present or prospective employee or member because of race, color, creed, national origin, religious belief, or Union affiliation". The Article carries the heading "Hiring and Rehiring" and it first appeared in the agreement August 13, 1945, by virtue of a Tenth Regional War Labor Board directive of June 18, 1945, which included "political" as well as "religious belief." By negotiation "political belief" was amended out of the section. In this context and setting, therefore, Section 1 of Article X seems to authorize the practice of discrimination because of political belief; but whether the Section was intended to have any vitality outside of the field of hiring and rehiring is open to some doubt. In any event, we are unable to conclude that the Section limits or modifies the positive promises contained in Article I, Section 3 or Article VIII, Section 1 in such a way as to dispose of this dispute.

2. The reasons stated by the Company for the discharge.

When Doris Walker was discharged on October 6, 1949, a written notice was read to her by a Company official in

the presence of another Company official, a Union assistant Shop Steward and a Company stenographer. The notice read as follows:

"Mrs. Walker:

"As you are aware, the company has known for some time that when you applied for work with Cutter Laboratories on October 4, 1946, you made a number of false representations on your 'Application for Employment.'

"As we know now, you falsified the statement of your education so as to conceal the fact that you had completed a law school course at the University of California's School of Jurisprudence at Berkeley in May, 1942. You concealed the facts that you received the degree of Bachelor of Laws in May, 1942, and that you were admitted to the State Bar of California on December 8, 1942. You concealed that since that date you have at all times been admitted and entitled to practice as an attorney before all of the Courts of California.

"We know now that by falsification of the name of a previous employer, you concealed the fact that from June, 1942 to February, 1944 you were employed by the Federal Government's Office of Price Administration, including employment as an Enforcement Attorney at a salary of about $3,200.00 a year.

"We know now that you deliberately concealed from us that from February 1944 to December, 1945 you were employed as an attorney by Gladstein, Grossman, Sawyer and Edises, a well-known firm of lawyers specializing in labor cases.

"You know that a few weeks ago the 'Labor Herald,' the official CIO newspaper, stated that the National Labor Relations Board had sustained a cannery firm that had discharged you for refusing to answer whether or not you were a Communist.

"We have checked the records. We know now that you deliberately concealed that in 1946, just before you ap-

plied for work here, you were employed by a series of canneries and had been discharged by them.

"Ordinarily, an employee of the Company would be discharged immediately for falsifying material facts on an 'Application for Employment.' Because you were an officer of the Union we kept you on the pay roll rather than open ourselves to a charge of persecuting a union officer. We have given your case careful consideration because we know very well that no matter how strong the case against you there will be a claim of discrimination because of union activities.

"Because no employer wants to become involved in a dispute of that kind we have been patient and deliberate in our consideration of your misconduct.

"On October 1, 1948, when you testified under oath before a Trial Examiner of the National Labor Relations Board, you refused to answer the question as to whether or not you were a member of the Communist Party.

"You refused to answer under oath the question as to whether or not you were or had been a member of the Federal Workers' Branch No. 3 of the Communist Party.

"You refused to testify under oath whether or not you were or had been a member of the South Side Professional Club of the Communist Party.

"We are convinced now, that you were and still are a member of the Communist Party, that you were a member of the Federal Workers' Branch No. 3 of the Communist Party, and that you were a member of the South Side Professional Club of the Communist Party.

"Our recent investigation of your past record has uncovered previously unknown conduct that goes far beyond a mere concealment of material facts. We have just completed a thorough investigation and have a full report upon your past activities. We realize now the importance of the facts that you concealed from us.

We realize the full implications of your falsification and misrepresentations. A follow-up and investigation of the 'Labor Herald's' recent revelations has uncovered a situation far more grave than we expected.

"We are convinced now that for a number of years you have been and still are a member of the Communist Party. We are convinced beyond any question that for a number of years you have participated actively in the Communist Party's activities.

"The nature of our company's business requires more than the usual precaution against sabotage and subversion. Upon a disclosure that any employee is a member of the Communist Party, or has participated in other subversive or revolutionary activity, we conceive it to be the responsibility of management to take action.

"Confronted with such a situation, any inclination to be lenient or to grant a union official special consideration is out. In the face of your record there is no alternative open to us except to terminate your services at once. Accordingly, you are notified now that you are discharged for the causes mentioned. You will be paid the full amount due to you promptly."

Doris Walker was not asked whether these charges were true or false; nor was she afforded an opportunity to answer or explain them if she chose to do so.

3. The Company and its operations.

The Company, with offices, barns and laboratories located in Berkeley, California, is engaged in the manufacture on a mass production scale, and in the sale throughout the United States and certain foreign countries, of vaccines, serums, antitoxins, dextrose, penicillin and other allied biological and pharmaceutical products. These products are used by the military as well as civilians; and the Company

is said to be "in a rather unique position as far as the armed forces are concerned inasmuch as we are the only laboratory of our type with a complete line of biologicals; we are the only laboratory producing penicillin west of the Mississippi. The (military) constantly orders its West Coast Supplies from us to keep us in constant readiness for emergency. . . . So that there is no difference in the present time than during the past four years, except the stepped-up volume of ordering and the emergency nature of the orders at present." It is conceded that the Company's operations were just as delicate and just as important when Doris Walker was employed as when she was discharged.

During World War II the Company was subject to stringent security control by the Federal authorities. The plant was under military control in this regard; there were elaborate rules and regulations, armed guards, patrols, the checking of both old employees and applicants, fingerprinting, etc.

The products and processes of the plant are said to be peculiarly subject to sabotage, because many of these products are in production for many months, and because average intelligence and very little coaching would enable anyone to render them dangerous without the Company's knowledge. On the other hand, destruction or damage by unannounced and sudden stoppages of the equipment is said to be "routine sabotage that you discover almost overnight." It is conceded that the plant was no more "prone to sabotage" when Doris Walker was discharged than it was when she was hired.

During World War II if an employee was deemed a "bad security risk", some agency of the government would re-

quest his or her discharge, but no one at this plant was ever so discharged. Nor does it appear that since World War II the Company has been under any contract obligation to any agency of the government to discharge employees who are "bad security risks". Nor did any government agency recommend the discharge of Doris Walker.

4. The Union.

The Union that signed the collective bargaining agreement dated July 23, 1948 was the Bio-Lab Union of Local 225, United Office and Professional Workers of America, C.I.O. It was recognized February 24, 1944, by the Company pursuant to a National Labor Relations Board election. It is a Union generally denominated as "left-wing"; and it, along with the U.O.P.W.A., was expelled from the C.I.O. March 1, 1950.

The Local is an amalgamated local consisting of about 1200 members, 400 to 500 of which are employed at Cutter Laboratories. The Union Constitution of the U.O.P.W.A. is before us; and it indicates that local officers are elected at meetings upon notice by secret ballot. The average attendance at such meetings is said to be 80 or 90 members.

In April of 1947 Doris Walker was elected Shop Chairman at the plant and also a member of the Executive Board of Local 225. In November of 1947 she was a delegate from Local 225 at the State C.I.O. Convention where she was elected a member of the State C.I.O. Executive Board. She also held some office in the regional U.O.P.W.A. council; and in the latter part of 1948 she was elected Chief Shop Steward at the plant. Both of these Steward positions primarily entailed representing the Union in grievances aris-

ing under the agreement; and these duties took her to all departments in the plant, except the executive and administrative departments. By understanding, her time for this purpose was limited to 45 mintues per day. In the spring of 1949 she was elected President of Local 225.

The term of office of Doris Walker as President of Local 225 expired December 15, 1949, and a new President was elected. The next day the new officers, including the new President, filed the affidavits required by Sections 9 (f), (g), (h) of the Labor-Management Relations Act of 1947 and thus first qualified the Union for the services of the National Labor Relations Board under that Act.

5. The collective bargaining history.

August 7, 1944, a wage dispute and 10 other disputed issues were submitted to the National War Labor Board. May 8, 1945, the Tenth Regional War Labor Board approved a panel recommendation from which on June 18, 1945, the Company appealed. Early in October, 1945, there was a 20 minute stop-work meeting of some, but not all, of the employees against the refusal of the Company to make the Regional War Labor Board order effective. October 15, 1945, an "interim wage scale" was, by mutual agreement, put into effect, retroactive to April 30, 1945. December 4, 1945, the National War Labor Board made its directive order; and May 22, 1946, the first complete contract between the parties was executed with a 10% raise over the interim wage scale.

January 20, 1947, the wage provisions of the agreement were opened and a 10¢ hourly wage increase was agreed upon by the parties.

June 18, 1947, the Union served notice of intention to amend the agreement and the same day filed with the National Labor Relations Board an unfair labor practice charge against the Company. Doris Walker had been elected Shop Chairman in April, 1947, and during that month she and another official of the Local had been the subjects of investigations into past employment, character and Communist affiliation. The investigations became soon known to them from neighbors who had been interviewed. These investigations were the basis of the unfair labor practice charge. The negotiations culminated in a strike which lasted from August 10 to 17, 1947. With the intervention of Harry Bridges, the strike was settled on August 18, 1947, as a result of negotiation with him, by a 10¢ wage increase, classification adjustments and other contract changes.

June 9, 1949, the agreement was again opened; and November 30, 1949, a two-year contract, effective October 1, 1949, was agreed upon, with a wage increase of 5¢ per hour, effective April 1, 1950 and an additional 2½¢ per hour, effective October 1, 1950, and other contract changes. This was the contract negotiation during which Doris Walker was discharged.

While there is a work stoppage and a strike in this collective bargaining history, both were directed at wage and contract issues. There is no evidence of any work stoppage, strike or other interference with production the avowed objective of which was political, philosophical, subversive or revolutionary.

6. The 1949 contract negotiations.

The negotiations were opened June 9, 1949, by the Union with a demand for a 20¢ per hour wage increase. The agree-

ment was not open otherwise than for wages. There ensued meetings between the Company and the Union during June, July, August, September and October, about the nature of which the testimony is in conflict. It is clear that some of these meetings, particularly those in August, were called to discuss grievances and not wages; but it is also clear that the wage issue was never abandoned by the Union. The Company steadily rejected the demand for a wage increase and at the outset offered reasons for the rejection with charts and arguments, to which the Union responded with a like presentation coupled finally with an indication of a willingness to compromise the 20¢ demand, subject perhaps to some delay contingent upon a C.I.O. warehousemen's wage negotiation (which was settled October 3, 1949). Some time in the early part of September, government conciliation services were called into play, apparently without avail through September.

October 2, 1949, Sidney Roger made a radio broadcast on behalf of the Union position in the negotiation. What the content of the broadcast was does not appear; but it is undisputed that the Executive Vice President of the Company was incensed by it and considered it as "dragging the name of the Company through the mud in public". The Union followed the broadcast with an advertisement in three east-bay newspapers on October 5, which stated the Union's notion of what was involved in the wage dispute and solicited the public, if sympathetic with the Union position, to call the Executive Vice President of the Company by telephone, giving his office telephone number.

October 5 three representatives of the Union, including Doris Walker and three representatives of the Company,

including the Executive Vice President, met to discuss a grievance unrelated to this case. The attorney for the Company was also present, which was unusual at a grievance meeting. The Executive Vice President was still angry over the broadcast and asked Doris Walker and the Business Agent of the Union who was responsible for the broadcast, observing that he thought no employee of the Company could be responsible, for, as he said, "it is a dirty bird that fouls its own nest". The Business Agent responded that the Union was responsible for the broadcast.

The next day, October 6, 1949, Doris Walker was discharged and there was read to her the written statement of the reasons for her discharge quoted above. Shortly thereafter this written statement was read to the employees of the plant at a meeting called by the Company. Although the Executive Vice President testifies that no one was authorized to make any additional statement, it does appear that statements were made at this meeting by officials of the Company, either to the entire group or in private discussion afterward, advising employees "to get out of that left-wing union" and telling them that "nothing but a left-wing union would press for wage increases at this time".

October 10, at the first wage negotiation meeting after July or August, the Company offered the Union a two-year agreement, without any wage increase, as a demonstration, it was said by the Company, that there was no feeling or animus against the Union and that the discharge of Doris Walker had nothing to do with the Company's attitude toward the Union. The Company asked whether the Union intended to make the discharge of Doris Walker a part of the negotiations; and the Union negotiator replied that

they had filed a grievance and would pursue the discharge through the grievance channels.

November 30, 1949, a two-year contract, effective October 1, 1949, was agreed upon with the wage increase described above. Contemporaneously with the execution of the agreement an Addendum was executed, by the terms of which the Company agreed, pending the holding of a union-shop election, to join the Union in urging all eligible employees and all newly-hired eligible employees to become and remain members in good standing of the Union. This the Company did. It is said by the Union that the Addendum was executed at its behest, in order to show some outward evidence that the Company was not intending to destroy the Union.

7. The discharged employee (education, prior employment, job performance).

Doris Walker was born in Dallas, Texas, April 29, 1919. Her maiden name was Brin and her father was born in Texas, her mother in Maryland.

She attended Dallas High Schools; University of Texas, one year; University of California of Los Angeles (B.A. with honors in English); University of California Law School (L.L.B.). She was elected to Phi Beta Kappa and to the editorial board of the California Law Review.

Before her employment by the Company, she was employed: as an enforcement attorney with the Federal Office of Price Administration in San Francisco (1942-1944); as an attorney with the firm of Gladstein, Grossman, Sawyer & Edises in San Francisco (1944-1946); as a cannery worker sorting and trimming vegetables in 3 canneries in Oakland and Berkeley (total employment less than 2 months in

1946); and as an organizer for the Food, Tobacco & Agricultural Workers Union until the National Labor Relations Board Cannery elections in September, 1946.

She says she went to law school "because I was interested in becoming a labor lawyer". She left the law firm in San Francisco because, she says, "my time was spent on routine civil matters—divorces, adoptions, personal injury cases and the like—and I became dissatisfied with my work and felt that I would rather take a more active role in the field in which I was interested and so I quit in order to take a job in a plant".

The Company maintains that she took employment with them as a member of the Communist Party, evaluating her action solely from the point of view of the welfare of the working class and the strengthening of the Communist Party.

Her first job with the Company was as Label Clerk in the Production Planning Department. She worked at a desk opposite her supervisor in a room with 15 to 20 desks close together. Copy for labels for cartons and direction sheets were prepared in another department and sent to her, whereupon she prepared an order to the print shop on the premises. When the printing was set, she read proof, attached an approval sheet and circulated it to 5 or 6 other people for their approval before final printing. She was also responsible for keeping a file of all these labels and directions.

Her next job (April, 1949) was as Clerk Typist in the Purchasing Department. She worked at a desk in the same room with her supervisor. There she received purchase requisitions which she typed on purchase orders which were

signed by the Purchasing Agent, whereupon she would mail out copies to the vendor and to others in various departments of the Company. She also did general typing for the department.

A specimen Company Personnel Rating Sheet dated August 16, 1949, shows her "below average" only for strength and health ("absent quite often"); she is "average" and mostly "above average", in all other respects, such as Friendliness, Cheerfulness, Satisfaction in Job, Dexterity, Fast or Slow Worker, Quick to Learn, Initiative, Energy, Promptness, Unnecessarily Talkative ("seldom talks"), Waste of Time ("wastes very little time"), Promptness ("work always finished on time"), Conscientious ("generally dependable and conscientious"), etc.

She has been twice married—to Marasse in December, 1939 and to Walker in September, 1946—and she appears always to have used her correct legal name. She has never been arrested or convicted of crime. It is a fair statement from this record to say that, during the entire three year period of this employment, her conduct and her performance on the job have been consistently satisfactory to the Company.

8. The Application for Employment.

The Application for Employment dated October 4, 1946, was filled out under the name of "Doris Brin Walker" on a printed form supplied by the Company which carries her photograph.

Under the heading "Education" she concealed her attendance at law school, her law degree and her admission to practice law by the State Bar.

Under the heading "Previous Employment" she concealed her entire previous employment record and showed a false employment as file clerk for 6 or 8 months in 1939 by "John Tripp, Att'y" (a fictitious name). She gave two references, a dentist and a lawyer in San Francisco, but she called both of them and told them of the omissions and falsifications in the application with the result that their letters of recommendation, when solicited by the Company the same month, did not reveal the subterfuge.

Doris Walker admits that she made the omissions and falsifications intentionally for the purpose of deceiving the Company because it was her information and her belief that if she answered the questions truthfully the Company would not employ her. It appears without contradiction that not later than the summer of 1947 Company officials let Doris Walker know what they had learned from the 1947 investigative report; and it further appears that she had learned from those interviewed that the investigation was directed at Communist Party affiliation.

In all other respects the application was true and correct. The application did not contain any question touching the subject of Communist Party membership or any question about any affiliation or belief; and no Company Application for Employment ever did contain any such questions until June, 1949, when a new form was put into use asking about religion and also about membership in the Communist Party or "any connection with organizations listed by the United States Department of Justice as a Communist 'front'."

9. The Company's evidence of Communist Party Membership and Affiliation.

Three officials of the Company met with its attorneys after the grievance meeting on October 5, 1949, and remained in session until midnight considering evidence which the attorneys had marshalled as follows:

a. The records of the State Bar showed that no lawyer by the name of "John Tripp" had ever been licensed to practice law in California; but these records did show that a man whose given names were "John Tripp" had been admitted to practice July 7, 1942, and it was developed otherwise that he was Doris Walker's supervisor in the O.P.A. (1942-1944). These records also showed that Doris Brin Marasse was admitted to practice December 8, 1942, and that February 28, 1947, she gave notice of change of name to Doris Brin Walker.

b. A transcript of the record of hearings before the National Labor Relations Board September 30 and October 1, 1948, showed proceedings by discharged cannery workers, including Doris Walker, for reinstatement with back pay and also the refusal by Doris Walker to answer the question, "are you or were you ever a member of the Communist Party?".

c. Reports of the Joint Fact-Finding Committee on Un-American Activities in California for the years 1943, 1945, 1947, 1948 and 1949 published by the California Legislature contained the following: the 1947 and 1948 Reports mentioned her supervisor in the O.P.A. and detailed his association with persons said to be "members of the Communist Party organization"; the 1948 Report stated that "attorneys for the Communist Party are Gladstein, Andersen,

Resner, Edises and Sawyer"; the 1949 Report notes one of the persons whom Doris Walker gave as a reference in her application for employment as an instructor in the California Labor School offering a course listed as an "analysis of capitalist economy for advanced students" and called "The Soviets—Fact and Myth. Everyday Life in the Soviet Union. How the Soviets Look at the World"; the 1945 Report stated the identity of the Communist Political Association with the Communist Party despite a change of name "for strategic reasons May 20-23, 1944"; the 1943 Report contained a biography of Archie Brown, an admitted member of the Communist Party and a candidate for various public offices on that ticket, which mentions sponsors of his from various unions, including the U.O.P.W.A.; the 1949 Report quoted the 1941 and 1944 Reports as stating that the "People's Daily World", a newspaper, is "the official organ of the Communist Party on the west coast."

d. The "People's Daily World" contained the following information: the February 14, 1944, issue under a heading "Meet the People" noted that Doris Marasse, "former leader of C.I.O. United Federal Workers, is switching jobs. . . . she will soon grace the office of outstanding Labor Attorneys Gladstein, Grossman, Margolis & Sawyer"; the May 11, 1948 issue contained a letter to the editor signed "Dobby Walker, Oakland," complaining about male chauvinism in the description of a woman lawyer; the June 14, 1944, issue listed Doris Walker's attorney as an alternate delegate to a State Committee of a "newly formed California State organization of the Communist Political Association"; the October 31, 1946, issue noted a radio program conducted by Doris Walker's attorney on behalf of a "citi-

zen's Committee for Archie Brown for Governor . . . the Communist write-in candidate".

e. A photostatic copy of an unaddressed handwritten letter dated "7/10/46" and signed "Doris Brin" discussed the propriety of the introduction of a resolution on the maritime strike at the Cannery Workers Club by the writer and another, indicated perturbation and finally a conclusion that the introduction of "such a resolution into my Club did not meet my tests and was wrong", and stated that "I tried to evaluate my action, as I try to evaluate whatever I do, from the point of view of the welfare of the working class and the strengthening of the Party".

f. Two unidentified undated documents contained biographical material about Doris Walker, which stated among other things, that "Doris Brin Marasse (nickname 'Dobby')" was issued 1945 Communist Party membership card #40360"; that she joined the Communist Party in June, 1942 and had held various positions in various clubs and sections of the Party, including the "Cannery Club"; that her present husband was a Communist Party member and organizer; and that in February, 1946, she listed the following information among other things on a Communist Party interview form: "she gave up law practice because it was frustrating to work with people she had to work with (namely, professional people)."

When she was discharged, Doris Walker was not confronted with any of this evidence, but she was confronted with it at this hearing. She was asked on cross-examination, "Are you now or have you ever been a member of the Communist Party?" to which her attorney objected upon

the ground that the political affiliations of an employee are immaterial; that, as a matter of public policy, an employer has no right to inquire into the political affiliations of an employee; that by continuing to employ her after becoming convinced within 6 months after her hiring that she was a Communist, the Company waived this issue as a ground for discharge; that this Board is not the proper tribunal to try the question whether she is a Communist; that, even if she were a Communist, this fact would not constitute just cause for discharge; and that, without conceding that she is or was a Communist and without conceding that the Communist issue was the real motive for the discharge, it could stand admitted, for the purposes of decision, that the Company believed in good faith upon the basis of evidence that she was a Communist.

The attorney for the Company declined to accept such an admission upon the ground that "a party cannot, by making concessions and admissions, preclude the other party from pursuing his examination for the purpose of bringing out before the tribunal and laying on the table, so to speak, the evidence in all its gory details" and upon the further ground that all of the evidence on the Communist issue would "go to the question of the extent and the aggravation of the misrepresentations in the application for employment".

Upon consultation, Mr. Heide dissenting, we overruled the Union's objection because sustaining it involved making a ruling upon ultimate questions in the case, because rules of evidence are not customarily applied in arbitration proceedings as they are in legal proceedings, and because a

broad evidentiary exclusion such as this might leave a participant in an arbitration proceeding with a conviction that he had not been fully and fairly heard.

We coupled the ruling with the statement that we would not instruct the witness to answer the question, if she did not care to do so, but that if she refused to answer we would draw all justifiable inferences from the refusal. It is our understanding of the California law that a witness in an arbitration proceeding may be put under compulsion by a court order to answer material questions if so instructed by the arbitrators. This Board unanimously agreed that it was our duty as arbitrators to conclude the hearing, if possible, without the interruption and delay of proceedings in court.

Doris Walker declined to answer the question as "an absolutely unwarranted invasion into my private beliefs". She likewise declined to answer a long series of collateral questions relating to clubs, sections and offices in the Communist Party; persons mentioned in the Legislative Reports; the documentary evidence of the Company on the Communist issue, including the letter of 7/10/46 signed "Doris Brin"; and so on.

In view of her refusals to answer these questions and our announced intention not to put witnesses under legal compulsion, the Company manifested a like reluctance to disclose the source of much of its evidence on the Communist issue and was accorded a corresponding immunity from cross-examination with a like caution about inferences.

With the record in this posture, we invited, and the record contains, motions to protect their legal positions from both parties. We took these motions under submission with the

assurance that we would call the parties in for further hearing and put witnesses under compulsion, if upon final consideration we should conclude that anyone had been denied a fair hearing.

10. The Company's knowledge.

The Company says that it has always considered the Union to be Communist-dominated, has constantly feared "potential sabotage" since the late 1930's, and has always maintained a policy of not hiring Communists and of keeping an eye on fellow travelers for future references. On the other hand, the Company application for employment never contained any questions on this subject until June, 1949, and then, existing employees were not queried.

The investigation of Doris Walker in 1947 was specifically directed at Communist affiliations and it is admitted by the Company that the report indicated that she was a Communist. The testimony of the three executives of the Company responsible for personnel, taken together, shows an affirmative belief 6 months after she was employed that Doris Walker was a Communist. Moreover, it is admitted by the Company that the 1947 report disclosed all of the omissions and falsifications in the Application for Employment except the cannery employment and the fictitious employer; and there is circumstantial evidence tending to show that these two facts were also known then.

The State Bar records now produced here would have shown that the lawyer-employer was fictitious; and the dates of this employment shown on the Application for Employment were inconsistent with the school record disclosed by the 1947 investigative report.

Part of the duties of one of the officials of the Company was to scan a newspaper, the "Labor Herald", to which the Company was a regular subscriber commencing in June, 1948. September 24, 1948, a secretary at Cutter Laboratories telephoned the "Labor Herald" to make sure that, by proper addressing, the newspaper would reach the desk of the Company official in charge of personnel. Both the October, 1948, edition (page 3) and the August 23, 1949, edition (page 6) of the "Labor Herald" carried articles about the cannery hearings before the National Labor Relations Board and Doris Walker's refusal to answer questions touching her Communist Party membership. Both articles carried half-page headlines at the top of the page and the 1948 article carried the name "Doris" in the headline.

The Company officials claim that it was the August 23, 1949, article in the "Labor Herald" that touched off the 1949 investigation of Doris Walker, but they deny ever having seen the October 19, 1948, article.

Doris Walker was subpoenaed to attend these cannery hearings on September 30 and October 1, 1948. Her supervisor admits that she told him she was subpoenaed "to appear before a labor hearing". But he says he inquired no further and, although leaves of absence for Union business were customarily cleared by letter from the personnel department, he could find no such letter in the files.

While the Company says that the 1947 investigative report did not show Doris Walker's cannery employment, it is admitted that it did show she had been a C.I.O. organizer and the record does not show the performance of organizing activities by her anywhere except at the canneries.

Finally, while the man on the street may have been unaware of the details of these cannery hearings, it is difficult to see how an affair of such magnitude could have gone on in the same community and yet have escaped the notice of the entire personnel department at Cutter Laboratories.

All of this circumstantial evidence taken together makes out a strong case that the Company knew about the cannery affair in 1948. From it we have no hesitation over finding at least a general indifference on the part of the Company about Doris Walker's activities until the autumn of 1949 and a specific indifference about obvious "leads" or clues to her background.

The attorneys for the Company have been the same throughout. The Company says that Doris Walker was not discharged in 1947 upon advice of counsel: that there was a desire to "lean over backward" rather than to be accused of harassing Union officials and that there was not sufficient evidence on hand then "to make the discharge stick."

Practically all of the evidence which the attorneys marshalled in 1949 is essentially directed at a membership in the Communist Party commencing 5 years before 1947 and at relevant associations or affiliations occurring between 1942 and 1947. While the cannery hearings before the National Labor Relations Board occurred after 1947, they occurred 11 months before the discharge; and the photostatic copy of the letter signed Doris Brin is dated one year and 9 months before April, 1947.

No further investigation of Doris Walker appears to have ensued until August, 1949. The Company says that it made no further investigation until 1949, because "there seemed to be no point to do it" and because, although it was open

to the Company to take the same investigative measures in 1947 that were taken in 1949, "maybe we were stupid . . . but we let it rest at that point".

The arguments of the parties:

The Union argues in substance that whether Doris Walker was or was not a Communist is irrelevant because her political beliefs are not a proper issue on the question whether she was justly discharged; that hence, for purposes of argument or decision without conceding the fact, it may be assumed that she was a Communist; that she refused to answer questions on that issue upon advice of counsel; that the reasons for the refusal should be considered from the standpoint of one who is active in the labor movement and they are two-fold: *first,* the consequence of answering that question in the affirmative is economic death because more and more private employers are placing themselves in the positions of the guardians and trustees of the so-called loyalty of employees and a process is developing in this country which, if carried to its logical conclusion, would result in the elimination of the Communist issue by the method always preferred by Fascists the world over, namely by starvation and physical annihilation of all Communists, a process which history shows never ends with Communists but always goes on to liberals, trade unionists, people of minority races and colors, and finally the destruction of all culture, and *second,* the consequence of answering that question in the negative, is the risk of a prosecution for perjury based upon the fact that it is not too difficult to "frame" an active labor person, such as, for example, Mooney or Bridges; that, while there were falsifications

and omissions in Doris Walker's application for employment, they were minor in character and of a kind frequently and notoriously indulged in by employees in order to get work; that an understanding of idealistic motives and her demeanor in testifying leave no room for any sinister inference to be drawn from her leaving the practice of the law and entering the labor movement; that security was not the reason she was discharged, because, upon a belief by the Company that she was a Communist in 1947, confirmed by investigation then, she was not put under surveillance or denied access to any part of the plant and because the form of application for employment never contained any questions on the subject of Communism until June, 1949; that the policing of the political doctrine and philosophy of Communism, is not within the province of private employers; that the history of the labor movement indicates all too frequently that the charge of Communism is either a fabrication or a lever seized upon by employers for the purpose of interfering with, weakening or destroying trade unions and that such was the motive here; that the charge of Communism cannot be severed from her union activities because it was injected into the middle of a wage dispute and levelled at her as the accepted and acknowledged leader of the Union; that the Company was convinced that Doris Walker was a Communist early in 1947 and then had as a result of investigation ample information or ready access to all the grounds assigned or shown for her discharge in 1949; that Doris Walker never was confronted with, or afforded an opportunity to explain, any of the evidence upon which her discharge was based; that employees have the right to believe that misconduct or irregularities, which are known to

the employer and not acted upon, have been forgiven; that Communists have a right to make a living, and, if their beliefs are dangerous, then the proper authorized agencies of government should proceed to take action against them through the channels of due process of law, but this the government has, so far at least, not seen fit to do; that changes in the general temper of the times and public opinion between 1947 and 1949 figured in the discharge; that Communism is the guiding philosophy of at least half of the world today and that you cannot call that which dominates and influences the thinking of nearly a billion people just a conspiracy or something that is not entitled to be dignified by being referred to as a political philosophy; and that the time must come when once again, as during World War II, we must establish a relationship of comity and friendship with that part of the world which is under Communist leadership, because the alternative is the absolute extermination of civilization and of every human being.

The Company argues in substance that the Company is not an ordinary employer but a defense plant engaged in the production of products vital to the armed services as well as the civilian community; that this case should be decided, not only in the light of the facts of industrial life, but on the facts of world events as they are now pressing upon us; that certain recent Court decisions illuminate the true significance of Communist Party affiliation and of the Communist conspiracy and its effect upon our nation (*Lawson v. United States*, 176 Fed. (2d) 49; *American Communications Association v. Douds*, 339 U. S. 382 especially the concurring and dissenting opinion of Mr. Justice Jackson; *National Maritime Union v. Herzog*, 78 Fed. Supp. 146; *Inland*

Steel Company v. N.L.R.B., 170 Fed. (2d) 247; *Barsky v. U. S.*, 167 Fed. (2d) 241; *Lockheed Aircraft Corporation v. Superior Court*, 28 Cal. (2d) 483; and also the speech of Senator Warren Austin delivered before the Security Council of the United Nations on August 3, 1950); that, notwithstanding *Schneiderman v. U. S.*, 320 U. S. 118 these authorities show a conviction widely held that membership in the Communist Party includes an obligation to commit acts of sabotage and destruction; that in our society, private employers operate most of the defense plants, at least in time of peace, and if they are to be foreclosed from exercising their right of discharge in a case such as this, the country is deprived of one of its important bulwarks against espionage and sabotage and traitors' conduct prior to a "hot war" as distinguished from a "cold war"; that in other societies, one could say a private employer or private person should not act until the government first acted, because there the government comes into every phase of life, but in this country, under our philosophy, where the government steps in only after a danger has become so clear that it cannot act otherwise, a private employer may act on facts, the impact of world events as they come in the newspaper, without waiting until some statute is passed to remedy the situation; that it does not take any Federal Bureau of Investigation to run down most of the facts in this case; that the discharge in this case is based, not on suspicion of Communism, but upon specific, concrete, documented evidence of actual Communist Party membership and participation and that this evidence stands uncontradicted upon the record; that membership in the Communist Party is ground for discharge; that the claim of Doris Walker that all of her actions and all

of her motives are those of legitimate trade unionists is a frequent and usual technique of the left-wing Communist Party labor leaders; that the Company should not be criticized for what is claimed by the Union to be summary action on October 5, 1949, and should not have its legal rights taken away because it waited until it had corroborative documented evidence; that if the Company ever had been going to discharge Doris Walker for Union activities, it would have done so during the strike in August of 1947 when Harry Bridges was brought into the negotiation; that there was no critical labor situation in 1949 because the contract was eventually signed without any strike or even a formal request by the Union officials for a strike vote; that by reason of the failure of Doris Walker to answer questions put to her at this hearing by the Company on the Communist issue and by reason of this arbitration board's refusal to instruct her to do so, the Company has been deprived of the opportunity to present the full implications which Communist membership justifies an employer in assuming to be true; and that the Company's position is that the evidence in this case demonstrates beyond question that Doris Walker is, not merely a conspirator, but a traitor and an enemy of her country.

First. Most people hold decided opinions about some of the questions that have been raised in the presentation of this case. This fact has been reflected both in the proof offered and in the arguments, which pose many issues of general public importance that seem to us to go beyond the scope of our legitimate authority or responsibility to decide.

This is not a forum for the determination of the survival of world culture or for the vindication of Doris Walker's personal beliefs or her constitutional rights. Both the griev-

ance and the authority of this Board rise only from the collective bargaining agreement and the grievance is a contract grievance. Moreover, it is the Union's grievance, as much if not more than hers, for the commitments about discharges are made to the Union, for its own protection, as well as a matter of concern to every employee covered by the agreement; and the Union is here pressing the grievance.

Nor is this a forum for the delineation of the Company's public responsibilities as an adjunct to the national defense in time of war. Doris Walker was hired and employed for three years during a "cold war", but she was discharged long before hostilities broke out in Korea. If war with Russia lies ahead, our government will no doubt take the necessary precautionary measures against sabotage and other menaces to the public safety, as it has done during prior wars and as Congress now gives indication of doing. But it does not appear that the government has meanwhile delegated this function to the Company or to any of the multitude of other private enterprises that can qualify as adjuncts to the national defense.

If the Company's argument is meant to imply that, as bulwarks of national defense in anticipation of war, private employers have a right of discharge that goes beyond or in derogation of their collective bargaining commitments, as a board of arbitration we cannot agree.

It has been our attempt to approach and view this case from the standpoint of what we consider the immediate and ultimate issues to be: was this discharge "just" in the sense that it was based upon grounds reasonably related to the employee's competence, performance and general suitability in the job; was the discharge based upon a motive by the Company to "interfere with, restrain or coerce an em-

ployee because of membership or lawful activity in the Union"?

Second. The Company maintains that the basis for the discharge was two-fold: the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail.

That the Company honestly believed all of these things is admitted and the accuracy of those beliefs is established in the record as follows: by admission with respect to the omissions and falsifications in the Application for Employment; by undenied and uncontradicted evidence with respect to the membership in the Communist Party; and by uncontradicted evidence that the Company's beliefs about the full implications of Party membership were prevalently understood and shared.

In this view of the record, and we take this view, we are unable to find that the Company has been denied a fair hearing by reason of our refusal to instruct Doris Walker to answer the questions put to her touching this issue. Assuming that her answers would have been favorable to the Company's position, they would serve no more than to corroborate what we find is already established by the record; and the Company offers no convincing reason why further corroboration is necessary. The Company's motions are accordingly denied.

While an employer may have sufficient grounds for a discharge, this collective bargaining agreement presents additional questions: whether in the circumstances the em-

ployer may "justly" act on grounds for discharge which he once had but long failed to exercise; and whether the grounds which he asserts are the real motive for the discharge. Evidence that raises both of these questions stands in this record.

Third. It is a familiar principle of law, industrial relations and common sense, that the existence of a right may be doubted or lost by reason of an unjustifiable failure to assert it.

It is admitted that Doris Walker's conduct and the quality of her work were no different in 1949 from what they were in 1947. It is uncontradicted on the record that all of the essential facts upon which the discharge was based were in existence in 1947 and some years before. And finally it is established to our satisfaction, by admissions of the Company and by proof, that the reasons assigned in 1949 by the Company for the discharge were both known and believed by the Company in 1947.

This state of the record raises a doubt that the Company ever took the assigned grounds for discharge seriously. The Company puts forward two answers:

First, the Company says that Doris Walker was not discharged in 1947 because, "if the person is in the Union they get more breaks in our place than if they are not members of the Union, if they are active". If this was an adequate reason for not discharging her in 1947, it was no less adequate in 1949, for by then Doris Walker had 3 years tenure and was more active than ever in Union affairs.

Second, the Company says that Doris Walker was not discharged in 1947 upon advice of counsel that the discharge would not "stick".

It appears that the advice was, not that the grounds for discharge were insufficient, but that, while there was belief or suspicion, there was not sufficient evidence of Communist membership or affiliation.

It further appears, by the evidence which the Company now produces, that all of the evidence touching this issue relates to Communist dogma and practices that have been common knowledge for at least eleven if not thirty years or more, and to specific affiliations, events and occurrences between 1942 and 1947, except Doris Walker's refusal to testify about Communist Party membership before the National Labor Relations Board on September 30, 1948.

Of course it is true that satisfactory evidence, or perhaps any evidence, of this kind is difficult to secure; but what is before us was secured in 1949 and there is no showing that it was unavailable to the Company in 1947 or even that it was more difficult to secure in 1947 than in 1949.

Finally, it appears, by admissions of the Company, that notwithstanding the 1947 investigative report, there was no further investigation until the autumn of 1949. This is inexplicable to us if there was real concern about the combination of Communist Party membership and the omissions and falsifications disclosed by the 1947 investigative report.

From all of this we are unable to find any satisfactory excuse for the Company's delay of over two years in asserting the grounds for discharge presented here. Contract relationships lose effectiveness if grievances about performance are not promptly discussed, settled or brought to an issue. This cuts both ways: unadjusted dissatisfactions of

either employer or employees cumulate and exaggerate the importance of ensuing minor dissatisfactions. It seems to us that a commonplace of any "just" system of discipline is the swift imposition of the penalty upon the heels of discovery of the offense. Under an agreement like this one, an employer should not be entitled to carry mutually known grounds for discharge in his hip pocket indefinitely for future convenient use.

In view of the foregoing considerations, we find that the grounds asserted by the Company for the discharge were stale.

Fourth. If we doubt that the reasons assigned by the Company were the real motive for the discharge, and what we have just found raises this doubt, there remains to consider whether some other motive is established by the evidence.

The discharge of a top Union official and negotiator at a passionate climax in the middle of a stubbornly contested wage negotiation, standing alone, raises an inference that the discharge is retaliatory in nature and designed to restrain, coerce or interfere with the employee because of lawful Union activity. And we find convincing circumstantial evidence to support this inference.

Two things that had lain fallow appear to have come to life when the Union opened the agreement for wage adjustment in June of 1949. The Company then put into use a new form of Application for Employment which for the first time asked questions about religion and Communist affiliation. Then also, for the first time in over two years, the Company ordered a fresh investigation into Doris Walker's Communist affiliations.

The discharge took place in a wave of heat over a radio broadcast and a newspaper advertisement, neither of which was complimentary. But they do not appear to have made any original contribution to the usual exchanges that go on during most wage negotiations.

While the quality of Doris Walker's conduct and performance on the job had remained unchanged for three years, her position of importance in the Union had progressively increased. It was only a few months before the wage negotiation opened that she was elected President of the Local; and she was a member of the Union negotiating committee.

Of course it is common knowledge that any employer who discharges a Union official will likely be met with a charge of discrimination. But Union officials are no more immune from discharge than anyone else. Indeed, Union officials may owe a higher standard of conduct than other employees; and arbitrators have so held *(International Harvester Co.,* 14 L. A. 986 (1950); *Bethlehem Steel Corp.,* 6 L. A. 617 (1947)). Union officials have been discharged and the discharges have "stuck", when there has been evidence to justify it.

In view of all of the foregoing considerations, we find that Doris Walker was unjustly discharged, that the reasons assigned by the Company for the discharge were not the real reasons and had been waived, and that the discharge interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation.

The award is that Doris Walker was discharged by Cutter Laboratories, Inc., on October 6, 1949 in violation of

Article I, Section 3 and Article VIII, Section 1 of the collective bargaining agreement dated July 23, 1948 as amended. She is entitled to reinstatement and to back pay limited by Article VIII, Section 1 to eight (8) weeks full time regular pay less any gross earnings or unemployment compensation during such period.

Dated at San Francisco, California, September 16, 1950.

We concur:

/s/ HUBERT WYCKOFF

/s/ PAUL HEIDE

We dissent:

/s/ J. PAUL ST. SURE

and will file a statement outlining the grounds of dissent.

In the Superior Court of the State of California
in and for the City and County of San Francisco

Department 22—No. 402,101
Honorable Edward Molkenbuhr, Judge.

In the Matter of the Petition of Mabel Black and T. Y. Wolff, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers, its officers and members, for an order confirming an award in arbitration,

Petitioners,

vs.

Cutter Laboratories, a corporation,

Respondent and Adverse Party.

MEMORANDUM OPINION

The facts of this matter are as follows: In October, 1949, Doris Walker was discharged by the defendant in the midst of a labor controversy; the matter of discharge—whether it was "for just cause"—was referred to a board of arbitrators, consisting of parties agreed upon by the said Walker and the defendant corporation; at the hearing it was developed that the defendant corporation knew, and should have known, in the year 1947 that she was a member of the Communist Party and that she falsified and omitted facts from her 1946 Application for Employment; that notwithstanding knowledge of these facts, the defendant corporation continued her in its employment until her discharge in 1949.

The board in its written Opinion held that since the defendant knew, and should have known, of these facts for a period of two years it waived any rights it may have had to discharge her for either of said reasons. The board further determined that she was not discharged in 1949 because of any Communist affiliation or false Application for Employment, but that she was discharged because of her activity in a labor dispute between the union and the company in 1949 while she was president of a union and a member of the Negotiating Committee; that she was therefore not discharged "for just cause."

Defendant's objection to the confirmation of the award is that the board did not compel her to answer directly many questions as to her membership in the Communist Party (such as "are you now or have you ever been a member of the Communist Party?"), and her activities with reference thereto. The arbitration board, at the hearing and in rendering its decision, stated that it would assume, and it did as a matter of fact, that she was a member of the Communist Party up to the time of her discharge, and that the Company's belief at the same time about the full implications which Party membership is believed to entail was established without her answering the questions propounded to her. The board also found that there was no evidence of any work stoppage, strike or any interference with production, the avowed objective of which was political, philosophical, subversive or revolutionary. The board also determined that to have her answer these questions directly, and assuming that she would have answered them in the affirmative, would have been cumulative or corroborative of facts which the company knew, or should have known, for the two year pe-

riod prior to her discharge. I know of no legal objection to one employing a known member of the Communist Party in its business and keeping him so employed if that be its wishes. Membership in the Communist Party in itself is not sufficient to warrant a conviction under the criminal syndicalism act of California. The supreme court of the state of California in Communist Party vs. Peek, 20 Cal. (2nd) 536 at 548 had the following to say:

> "... to hold that this court will take judicial notice of the alleged fact that the Communist Party advocates force and violence, without any evidence of that fact, would not only require judicial notice of a fact ..., but it would also necessitate a finding that every registered Communist is a felon and could be convicted of a violation of our criminal syndicalism law upon mere proof of membership in the Communist Party. That is not the law."

The law of arbitration is well settled. It is not in the province of the court to substitute its conclusions or opinion for the award of arbitrators nor is the award subject to judicial review unless the award was (1), procured by corruption, fraud or undue influence; (2), there was corruption in the arbitrators; (3), the arbitrators were guilty of misconduct or refused to hear evidence material to the controversy or (4), the arbitrators exceeded their powers or imperfectly executed them. (Section 1228 C.C.P.)

I find no legal reason under the foregoing section for this court to vacate the award of the arbitrators.

The matter of whether she was discharged for just cause was the precise matter to be determined by the Arbitration Board. Arbitrators, under the law, may base their decision

upon the broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might otherwise have successfully asserted in a judicial action. There is no general rule in law that the arbitrators must find facts and give reasons for their award, though the arbitrators did so in this case in a 37 page written opinion. The award is definite and certain—reinstatement with back pay.

The award is therefore confirmed; motion to vacate award denied. Counsel to prepare written order.

Dated: February 28, 1951.

Signed by: Edward Molkenbuhr, Judge of Superior Court, Department 22, San Francisco, California.

(Vol. 122 A.C.A. 956.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 15,223

In the Matter of the Petition of Mabel Black and T. Y. Wulff, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members, for an order confirming an award in arbitration,

Petitioners and Respondents,

vs.

Cutter Laboratories (a corporation),

Respondent and Adverse Party and Appellant.

OPINION

On October 6, 1949, Doris Walker, a member and president of the respondent labor union, was discharged by the Cutter Laboratories, her employer. The union contended that Doris had been discharged because of her lawful union activities, and that such discharge was in violation of a col-

lective bargaining agreement existing between the union and the employer. The employer contended that it had discharged Doris because she had made false statements in her application for employment, and because she was a dedicated communist, and urged that these were just causes for dismissal within the meaning of the collective bargaining agreement. Pursuant to the terms of that agreement the dispute was submitted by both parties to a board of three arbitrators, one chosen by each of the disputants, and the third being a neutral arbitrator. The arbitrators, after taking considerable evidence, found that Doris had not been discharged for just cause within the agreement, but had, in fact, been discharged because of her union activities, that this was in violation of the collective bargaining agreement, and ordered her reinstated and paid limited back pay as provided in the agreement. The union duly moved the superior court to confirm this award. This motion was resisted by the employer on the basic grounds that the arbitrators had erroneously and prejudicially denied to it a fair hearing in that they had refused to compel Doris to answer questions as to whether she was a communist, and about her claimed communist activities. It was also affirmatively urged that the award was illegal and violative of public policy in that it ordered the reinstatement into a defense plant of a dedicated communist. A motion to vacate the award on these grounds was made by the employer. The trial court, in a memorandum opinion, pointed out that no prejudice was suffered by appellant by the refusal of the arbitrators to compel Doris to answer the disputed questions, because other evidence was introduced on these matters and because the arbitrators found that Doris was a member of the communist party up to the date of her discharge. The excluded

evidence was, therefore, held to be cumulative and its exclusion nonprejudicial. Thereupon, the trial court denied the motion to vacate and ordered the award confirmed. The employer, then, offered objections to the proposed findings, offered to produce evidence on its affirmative defense of illegality, and demanded a hearing on the issue. The amendments were rejected, the hearing denied, the award confirmed, and judgment ordered entered pursuant to the award. Cutter Laboratories appeals.

The collective bargaining agreement between the parties, effective at all times here relevant, provided for submission of union grievances to arbitration, provided how the arbitrators should be selected, and further provided that: "The decision of the Arbitrator or Arbitration Board shall be final and binding. * * * Any dispute as to whether a grievance arises out of the interpretation or application of the Agreement, shall be subject to the grievance procedure as herein defined and shall be subject to arbitration."

The general law on the power of the courts in passing on awards made by arbitrators under agreements similar to the one here involved has recently been reviewed at length by this court in *Crofoot v. Blair Holdings Corp.*, [1]119 Cal. App. 2d 156 (260 P. 2d 156). The review of the authorities there contained need not be repeated in this opinion. Suffice it to say that at [2]page 186 of that opinion, after discussing many cases, we concluded: "Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." The statute referred to is Section

[1]Advance Report Citation: 119 A.C.A. 207.
[2]Advance Report Citation: 119 A.C.A. 236.

1288 of the Code of Civil Procedure prohibiting the vacation of such awards except in cases "where the award was procured by corruption, fraud or undue means," or "where there was corruption in the arbitrators," or "where the arbitrators were guilty of misconduct" in refusing continuances or in "refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced," or "where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award * * * was not made." (See, also, Code Civ. Proc., § 1289, permitting modification of an award in certain limited situations not here involved.)

Of course the arbitration agreement can limit the powers of the arbitrators, but where it does not the courts are prohibited from reviewing the sufficiency of the evidence or the validity of the reasoning of the arbitrators, except as permitted by the statute. Limitations in the arbitration agreement will not be extended by interpretation so as to permit a review of the facts or of the law unless such intent is clearly expressed. In the Crofoot case the arbitration agreement provided that the decision of the arbitrators should be final "as to all facts found" and also provided that the arbitration was to be "mutually conclusive and binding as to all issues * * * save for such rights as the parties * * * may have" under the terms of the arbitration statute. It was held that under such an agreement the award was final and conclusive not only as to the facts but also as to the law, except as provided by statute. Certainly, in the present case the provision that the decision of the arbitrators shall be "final and binding" upon the parties is at least as broad as the provisions that the award shall be final "as to

all the facts found," and that it shall be "mutually conclusive and binding as to all issues" found in the Crofoot case.

In the Crofoot case, in discussing the inability of the courts to review questions of law, even where erroneously decided, this court stated [1](p.189): "Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts." Various questions of fact, of mixed law and fact, and of pure law are mentioned by the court, and as to each of them the court concludes [2](p. 190): "Questions of fact and the sufficiency of the evidence cannot be reviewed by the courts"; or [3](p. 190): "* * * we must conclusively assume those conclusions are supported"; or [4](p. 190): "* * * it was an error of mixed law and fact, or of law, and, as such, not reviewable on this appeal," or some such similar expression. It must therefore be accepted as settled law that except as provided by statute, and, as will be later pointed out, as to the defense of illegality, the sufficiency of the evidence to support the findings, mixed questions of law and fact, and pure questions of law contained in an arbitration award under such an agreement as is here involved, cannot and will not be reviewed by the courts.

The Crofoot case is similar to the instant one in another important respect. In that case the arbitrator made a short award completely disposing of the controversy, and supported it by a lengthy opinion setting forth his reasons for making the award, which amounted to detailed findings. In

[1] Advance Report Citation: 119 A.C.A. 239.
[2] [3] Advance Report Citation: 119 A.C.A. 240.
[4] Advance Report Citation: 119 A.C.A. 241.

the instant case a similar short award was made, and the two majority arbitrators joined in an opinion giving their reasons for making the award. The dissenting arbitrator filed a detailed dissenting opinion on the facts and on the law. In the Crofoot case, in discussing such an opinion, it was stated [1](p. 190): "Although these reasons are not spelled out in the findings, since it is the law that the arbitrator is under no compulsion to explain his award or give reasons for his conclusions *(Sapp v. Barenfeld,* 34 Cal. 2d 515 [212 P. 2d 233]), we must conclusively assume those conclusions are supported." At page 192 is to be found the following: "Obviously, the arbitrator did pass on this issue [an issue not disposed of in the findings or opinion] because he awarded damages to Blair. He was not required to set forth his reasons for doing so. It must be presumed 'That all matters within * * * a submission to arbitration were laid before the arbitrators and passed upon by them.' (Code Civ. Proc., § 1963 (18).)"

These rules that customarily give finality to both factual and legal determinations contained in an arbitration award are subject to at least one exception, and that is, the courts will vacate the award if it is found to be based upon an illegal transaction. An application of the rules applicable to this exception is to be found in *Loving & Evans v. Blick,* 33 Cal. 2d 603 [204 P. 2d 23]. That case involved an arbitration of a disputed sum due under a building contract pursuant to a clause permitting arbitration contained in that contract, and pursuant to a separate agreement to submit the dispute to arbitration. During the course of the arbitration one of the parties presented the special defense that one of the contractor partners was not licensed as required by

[1]Advance Report Citation: 119 A.C.A. 240.

statute and urged that this illegality invalidated the entire proceedings. The arbitrator made an award to the contractors without specifically passing on the illegality defense. This award was confirmed by the trial court. The Supreme Court reversed. Only three justices approved the reasoning of the majority opinion, one other justice simply concurred "in the judgment" of reversal, and three justices dissented, two dissenting opinions being filed. The basic holding of the majority opinion is disclosed by the following quotation (p. 609): "* * * the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court." The following quotations from the majority opinion disclose the basis of that opinion (p. 610): "It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise"; and again at p. 610: "In the absence of a valid contract no such rights can arise and no power can be conferred upon the arbitrator to determine such non-existent rights"; and again, in discussing the provisions of the arbitration statute, and in quoting with approval from 6 Corpus Juris Secundum, section 12, page 160, it is stated that " 'a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out

of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself' "; and again (p. 611): "Since an unlawful transaction cannot be given legal vitality by the arbitration process * * *"; etc. Thus, the majority opinion limits the exception to cases where the contract sought to be arbitrated is itself, illegal.

There should also be mentioned another case, a companion case, to the Loving & Evans case, decided the same day, namely, *Franklin v. Nat C. Goldstone Agency*, 33 Cal. 2d 628 [204 P. 2d 37]. This time four judges concurred in the majority opinion, and three judges dissented. In this case it was held that an order confirming an arbitrator's award in favor of a contractor should be reversed where the petition for confirmation failed to allege affirmatively, and it was not proved that the contractor had been properly licensed. (See, also, *Pawling v. Malley*, 107 Cal. App. 2d 652, [237 P. 2d 663].)

Thus, under the rule of these cases there can be no doubt that a prerequisite of a valid contract is an essential to an operative and valid award. Both cases involved the validity of the very contract authorizing the arbitration. In both cases the underlying contract was invalid because in violation of an express statute. In the present case the validity of the arbitration agreement is not at issue. The theory of appellant is that the arbitrators have found that the employee was a communist, and that to be compelled to reinstate such an employee in a defense plant is against public policy and therefore void.

Before discussing the application, or the possible application, of the rules of these cases to the instant one, a review of the facts should be given.

Cutter Laboratories manufactures vaccines, serums, and other biologicals, for civilians, and, is also under contract to make them for the federal government. The plant is capable of being sabotaged. During the war period the federal government exercised stringent security control over the operation of the plant, and had the right and power, never exercised, to require the discharge of any person who was a bad security risk. Such security control was abandoned at the end of the war, and no such control was exercised during the periods here relevant. Admittedly, no governmental agency was disturbed about Doris' employment, nor had any such agency recommended her dismissal.

The respondent union was a C.I.O. affiliate. The arbitrators, in their majority opinion, referred to it as a "left wing" organization, and admittedly, in March of 1950, after the occurrences here involved, it was expelled from the C.I.O. The employer, appellant here, had had some labor difficulties with this union before this case arose, but had entered into a collective bargaining agreement with it dated July 23, 1948.

Doris, the discharged employee, had graduated from law school with honors, and had been admitted to the California bar in 1942. She was then employed as an enforcement attorney by the O.P.A. and then went to work for the legal firm of Gladstein, Grossman, Sawyer & Edises, who handle labor cases. She left this employment because, according to her testimony, she became bored with routine legal matters and wanted to gain some practical experience in the labor field. She worked in a cannery for a short time and became an organizer for a tobacco and agricultural work-

ers' union. She went to work for the Cutter Laboratories in October of 1946, after filing with the company an application for employment. This application contained several false statements. It concealed her educational background, failed to disclose that she was an attorney, and falsely represented her employment background. It falsely represented that she had been employed by an attorney as a file clerk. It gave as references the name of an attorney and a dentist who, in their letters of recommendation, at Doris' request, also failed to divulge her legal and work background. Doris' explanation of these misrepresentations is that had she told the truth, Cutter Laboratories would not have hired her.

In all other respects the application was truthful. The application contained no questions about any communist affiliation and no false representations were made as to such beliefs.

When first employed Doris was hired as a label clerk and later as a clerk-typist. She continued in this employment until October 6th of 1949 when she was discharged. During this three-year period there were no complaints about her work. In the periodic ratings made by her supervisors she was rated as "average" or "above average" upon all of her job qualifications, and "below average" only as to health and absences from employment.

While working for appellant Doris became increasingly active in respondent union, holding various offices, until in the latter part of 1948 she became chief shop steward, whose primary function was to represent the union in grievances arising under the collective bargaining agreement. She rep-

resented the union in several controversies with the employer in this capacity. In the spring of 1949 Doris was elected president of respondent union.

During the period of Doris' employment there were some labor difficulties between respondent union and appellant. These arbitrators found that all of these had to do with wage and contract issues, and that there was no evidence of "any work stoppage, strike or other interference with production the avowed objective of which was political, philosophical, subversive or revolutionary." In April of 1947, at a time when Doris was a union official, the union charged appellant before the National Labor Relations Board with engaging in unfair labor practices. The appellant, during this month, investigated the past employment, character, and communist affiliations of Doris, and became fully aware of her false representations in her employment application and of her background, including communist affiliations, and of most of the other facts that two and a half years later were used as the claimed basis of her discharge. Nothing was done about these facts, however, in April of 1947.

In July of 1949 the collective bargaining agreement between appellant and respondent, pursuant to its terms, was opened for negotiations, resulting in November of 1949 (after the discharge of Doris), in a wage increase for the employees, and in other contract changes relating to labor conditions. Doris, as the then president of the respondent, was one of the union negotiators in this labor dispute. It was in the middle of these negotiations that Doris was discharged. The main question in dispute was a wage increase, the company refusing any increase, and the union demanding a 20-cent an hour increase, which, however, the union

offered to compromise. The company refused. Relations between the two contracting parties deteriorated. On October 2, 1949, a radio commentator made a radio talk in which he made an attack on the appellant's labor policies. This incensed the executive vice-president of the appellant. He considered the charges unfair. On October 5, 1949, the union placed paid advertisements in three east bay newspapers stating the union's position and soliciting the members of the public to telephone the executive vice-president of appellant and tell him what their opinion of the situation was. An acrimonious meeting between three representatives of the union, including Doris, and three representatives of the company, including the executive vice-president, was held on October 5, 1949, to discuss a labor grievance. The attorney for the company was also present, which was unusual. During this meeting the union representatives admitted responsibility for the radio broadcast, which made the employer representatives very angry.

The next day, October 6, 1949, Doris was discharged. This was accomplished by reading to her a letter prepared by appellant, which letter was later that day read to the employees at an employees' meeting called by the appellant. The letter states, as reasons for the discharge, falsifications upon Doris' employment application, and communist affiliations. The falsifications are enumerated as the failure to disclose that she had a law school education, had been admitted to the bar in 1942, had worked two years as an enforcement attorney for the O.P.A., had been employed by the Gladstein firm, and then went to work in a cannery from which position she had been discharged because she refused to answer at a labor hearing whether she was a communist.

This discharge was later upheld by the N.L.R.B. She also gave false information as to her prior employment record, which fact was stated in the letter. The letter stated that, although the company had known of these falsifications and normally would have discharged her, it had been decided not to fire her because the company did not want to be charged with persecuting a union official. The letter then went on to charge that the company had now learned of Doris' communist affiliations; that in October, 1948, at an N.L.R.B. hearing she had refused to answer the question as to whether she was a communist or was a member of any communist controlled group; that the company knew that she was a member of several designated groups that were communist controlled; that the company was convinced now that she was and had been a communist; that in view of the company's need for protection from sabotage it was necessary to now discharge her for the "causes mentioned." It is undisputed that prior to her discharge Doris was never asked the truth of these charges nor was she given a chance to answer them.

The union protested the discharge, claiming that the real reason for the discharge was that Doris was active in union affairs, and that this violated the terms of the bargaining agreement. The dispute, under the terms of that agreement, was submitted, by both sides, to arbitration.

Section 3 of article I of the collective bargaining agreement provided: "The Company agrees that it will not interfere with, restrain or coerce said employees because of membership or lawful activity in the Union nor will it attempt to discourage membership in the Union by discrimi-

nation in respect to hiring, tenure of employment or any other term or condition of employment."

Article VIII, section 1, in reference to discharges and layoffs provided:

"No employee shall be discharged except for just cause. The provisions of this section shall not apply to personnel reductions for lack of work or to effect economies.

"In the event an employee is discharged without just cause, he shall be reinstated without loss of pay, seniority, or other benefit, subject to the following limitations: * * *

"In case of reinstatement, the total back pay award allowable shall be limited to the full time regular pay of the employee for the period he was off the payroll, or a period of eight (8) weeks, whichever period is the shorter, less any gross earnings or unemployment compensation received or earned during such period." (In the remainder of the article minimization of damages, adjustment for sick leave benefits, a warning requirement, and notice of dismissal are dealt with.)

The agreement then sets forth a grievance procedure which was not here followed by the employer, and for the submission of disputes to arbitration. Admittedly, the issue here submitted to arbitration was whether the company had "just cause" for the discharge of Doris.

The majority of the arbitrators reviewed the evidence at some length and concluded that Doris was "unjustly discharged, that the reasons assigned by the Company for the discharge were not the real reasons and had been waived, and that the discharge interfered with, restrained and co-

erced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation."

The basic evidence that the company introduced at the hearing about Doris' affiliations dealt primarily with her activities between 1942 and 1947, except her refusal in October of 1948, eleven months before her discharge, to answer questions at the N.L.R.B. hearing. This evidence certainly would support a finding that Doris was affiliated, in these periods, with communist front organizations and was a communist. At the hearing before the arbitrators Doris was asked if she had ever been a member of the communist party. She refused to answer, her counsel objected, and the objection was overruled by the arbitrators. Counsel for Doris then offered to stipulate that the company, upon the evidence before it, at the time of discharge, in good faith believed that Doris was a communist. The stipulation was refused by the company. The board then told the witness that she would not be instructed to answer the question but that the board would draw "all justifiable inferences" from such refusal. Doris refused to answer on the ground that such question unjustifiably invaded her private beliefs. She also, on the same grounds, refused to answer a series of questions dealing with her alleged membership in related communist groups, with certain associations, or as to the authenticity of certain documents presented to her.

It should be here mentioned that the arbitrators extended to the company a similar immunity from cross-examination as to the sources of much of its information, with the same caveat as to adverse inferences.

The arbitrators in their award found that the company knew the basic facts about Doris, including her falsification

of her employment application and of her communist affiliations, as a result of its investigations in April of 1947; that, in fact, the company officials believed that she was a communist within six months after she was hired; that the company was indifferent to such facts; that the company knew, or should have known, of all the facts relied upon in October of 1949 for the discharge in 1947 and not later than October of 1948; that the arbitration board was not the forum in which to decide the company's responsibilities toward national defense; that the company had no right of discharge beyond its collective bargaining agreement; that the issue was whether "just cause" existed for the discharge.

The following finding should be quoted:

"The Company maintains that the basis for the discharge was two-fold: the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail.

"That the Company honestly believed all of these things is admitted and the accuracy of those beliefs is established in the record as follows: by admission with respect to the omissions and falsifications in the Application for Employment; by undenied and uncontradicted evidence with respect to the membership in the Communist Party; and by uncontradicted evidence that the Company's beliefs about the full implications of Party membership were prevalently understood and shared.

"In this view of the record, and we take this view, we are unable to find that the Company had been denied a fair

hearing by reason of our refusal to instruct Doris Walker to answer the questions put to her touching this issue. Assuming that her answers would have been favorable to the Company's position, they would serve no more than to corroborate what we find is already established by the record; and the Company offers no convincing reason why further corroboration is necessary. The Company's motions are accordingly denied."

The board then stated that even though an employer may once have had just cause for a discharge, such cause may be lost by unreasonable delay, and that, in view of the collective bargaining agreement, the issue still remained as to whether the grounds asserted were the real causes for the discharge. The board found, on the evidence, that after the company acquired knowledge of the main facts upon which it now relies in April of 1947, it evidenced no concern over those facts, and made no further investigation until 1949; that there was no reasonable excuse offered by the company for this delay in asserting the grounds for discharge now asserted; that general principles of policy require that labor disputes and grievances be quickly settled; that under the collective bargaining agreement here involved the "employer should not be entitled to carry mutually known grounds for discharge in his hip pocket indefinitely for future convenient use"; that the grounds "asserted by the Company for the discharge were stale."

The arbitrators then went on to find that, in fact, the discharge in the middle of labor negotiations was retaliatory in nature and designed to "restrain, coerce or interfere with the employee because of lawful Union activity," and that the assigned reasons were not the real reasons, and had been waived.

Appellant first attempts to bring itself within the literal terms of section 1288 of the Code of Civil Procedure, which is the section prescribing the situations in which the courts may vacate an arbitration award. The section provides, so far as pertinent here, that an award may be vacated where it is "procured by corruption, fraud or undue means," or where the arbitrators were guilty of misconduct in "refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced," or "where the arbitrators exceeded their powers." It is contended that the basic issue was whether Doris was a communist; that when the arbitrators refused to order her to answer questions about her communist affiliations they prevented appellant from proving its case, and depriving it of a fair hearing in violation of the above sections. The answer to these contentions is obvious. The board told the witness that if she did not answer the questions it might indulge in adverse inferences. Then the board not only found that appellant, in good faith, at the time of discharge, believed that Doris was a communist, but found that Doris was in fact a communist. Obviously, the answers to these questions, assuming that they would have supported appellant, could have proved no more than the board actually found to be true. Thus, as held by the board, the evidence not required to be produced would have been merely cumulative. The board's refusal to compel an answer in no way adversely affected appellant, nor could it have deprived it of a full and fair hearing. Clearly, none of the statutory grounds set forth in section 1288 of the Code of Civil Procedure for vacating an award exist.

Appellant's main contention is that regardless of statute the award here was "illegal" in the same sense that that

November 30, 1949, a two-year contract was agreed upon; on October 6, 1949, during the negotiations and at a time when company officials were angry at certain activities of Mrs. Walker purportedly in connection with union demands, the company's discharge of Mrs. Walker which is here involved took place.

At the time of the discharge a company official read to Mrs. Walker the following notice:

"Mrs. Walker: As you are aware, the company has known for some time that when you applied for work with Cutter Laboratories on October 4, 1946, you made a number of false representations on your 'Application for Employment'.

"As we know now, you falsified the statement of your education so as to conceal the fact that you had completed a law sheool [sic] course at the University of California's School of Jurisprudence in May, 1942. You concealed the facts that you received the degree of Bachelor of Laws in May, 1942, and that you were admitted to the State Bar of California on December 8, 1942. You concealed that since that date you have at all times been admitted and entitled to practice as an attorney before all of the Courts of California.

"We know now that by falsification of the name of a previous employer, you concealed the fact that from June, 1942 to February, 1944 you were employed by the Federal Government's Office of Price Administration, including employment as an Enforcement Attorney at a salary of about $3,200.00 a year.

"We know now that you deliberately concealed from us that from February, 1944 to December, 1945 you were em-

ployed as an attorney by Gladstein, Grossman, Sawyer and Edises, a well-known firm of lawyers specializing in labor cases.

"You know that a few weeks ago the 'Labor Herald', the official CIO newspaper, stated that the National Labor Relations Board had sustained a cannery firm that had discharged you for refusing to answer whether or not you were a Communist.

"We have checked the records. We know now that you deliberately concealed that in 1946, just before you applied for work here, you were employed by a series of canneries and had been discharged by them.

"Ordinarily, an employee of the Company would be discharged immediately for falsifying material facts on an 'Application for Employment'. Because you were an officer of the Union we kept you on the pay roll rather than open ourselves to a charge of persecuting a union officer. We have given your case careful consideration because we know very well that no matter how strong the case against you there will be a claim of discrimination because of union activities.

"Because no employer wants to become involved in a dispute of that kind we have been patient and deliberate in our consideration of your misconduct.

"On October 1, 1948, when you testified under oath before a Trial Examiner of the National Labor Relations Board, you refused to answer the question as to whether or not you were a member of the Communist Party.

"You refused to answer under oath the question as to whether or not you were or had been a member of the Federal Workers' Branch No. 3 of the Communist Party.

term was used in *Loving & Evans v. Blick*, 33 Cal. 2d 603 [204 P.2d 23], and *Franklin v. Nat C. Goldstone Agency*, 33 Cal.2d 628 [204 P.2d 37], discussed, *supra*. It is urged that to order the reinstatement of a dedicated communist, who had infiltrated herself into a defense plant by false representations, is against public policy, and is therefore illegal and void.

So far as the misrepresentations in the employment application are concerned, the finding that such cause for discharge had been waived is here conclusive. Certainly such misrepresentations would be just cause for a discharge if seasonably urged. But here the employer knew of such misrepresentations in April of 1947. It did not then discharge the employee, nor even question her about the false statements. It sat back for two and a half years, waited until the employee had become president of the union, waited until the company and the union were in the middle of labor negotiations with the employee as one of the chief union negotiators, and then discharged her, using the falsifications as an excuse, at a time when such discharge would be most injurious to the lawful activities of the union. As stated by the arbitrators, an employer cannot sit on a known cause for discharge and do nothing about it for two and a half years and then use this cause with the intent and for the purpose of injuring the union in its lawful labor activity. The finding of waiver is now conclusive.

Appellant, in an attempt to establish its public policy argument, builds up a most emotional picture about what might happen if a communist were ordered reinstated in a defense plant. It is interesting to note in this regard that, as pointed out by the arbitrators, no federal or state agency has expressed any alarm at such possibility. During the war

period the federal government insisted on security measures, such as the right to insist upon the discharge of any person deemed a bad security risk. Upon the termination of hostilities such security restrictions were removed. The period here involved was after the termination of hostilities and before the commencement of the Korean conflict. No federal agency complained about the employment of Doris, or at any time suggested that she be discharged. Although the evils of communism were well known long before 1947, neither the defense agencies of the government nor appellant saw fit to screen applicants for employment on the basis of their possible communist affiliations. The application for employment form prepared by appellant and signed by Doris contained no questions about the possible communist affiliations of the prospective employee. It was not until after the award here involved was rendered that such questions were added to the form. It must be remembered that appellant knew of Doris' affiliations at least as early as April of 1947. Admittedly, thereafter and up until her discharge in October of 1949, appellant made no effort to restrict her activities, nor did it take any security measures of any kind. Admittedly, her work during this entire period was entirely satisfactory to appellant, and admittedly, during this period, she committed no unlawful act against the appellant. Appellant did not consider her a menace until she became a negotiator for the union in a legitimate labor dispute. If the reinstatement of Doris as an employee is attended with the terrible possibilities now pictured by appellant, such possibilities have existed since 1947. If appellant is correct now in its attitude, it has been a willing and active participant in undermining the national defense by keeping Doris in its employ.

lished in the record," the board further found that the company had not satisfactorily explained the delay of two years (from 1947 to 1949) in asserting the grounds for discharge presented to the board and that such grounds were therefore stale. Finally, it was found by the board that the reasons assigned by the company were not its real reasons for discharging Mrs. Walker, and that actually the discharge, which occurred during wage negotiations, was "retaliatory in nature" and "interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation." As already stated, the board's award, based on the above findings, was that the company's discharge of Mrs. Walker violated the collective bargaining contract provisions against discrimination *because of union activity* and against discharging *except for just cause*, and that she is entitled to reinstatement and to limited back pay. The company failed to comply with the award, the union petitioned the superior court for its confirmation, and the company asked the court that it be vacated. (See Code Civ. Proc., §§ 1287, 1288.) After a hearing the trial court confirmed the award, and this appeal by the company followed.

Section 1288 of the Code of Civil Procedure provides, so far as here material, that "In either of the following cases the superior court . . . must make an order vacating the award, upon the application of any party to the arbitration: . . .

"(d) Where the arbitrators exceeded their powers . . ."

As ground for reversal the company contends, among other things and as it contended before the trial court in seeking vacation of the award, that an arbitration award

The precise limits of the power of a court to vacate an arbitration award on the ground of illegality have not been definitely fixed by the courts. Three members of the Supreme Court, by their dissents in the Loving & Evans, and the Goldstone cases, are definitely of the opinion that legality is simply one of the issues before the arbitrators, and that their decision on that issue, as on other issues, is not subject to review, except as provided by statute. Three justices, with a fourth concurring "in the judgment" are of the opinion that the courts may and should vacate on the ground of illegality, at least in certain situations. But, assuming as we do, that the majority opinions in those two cases properly state the law, all that was decided by those opinions was that when the underlying contract out of which the dispute sought to be arbitrated is illegal because in violation of a statute the courts have the power and duty to vacate. Here, of course, the collective bargaining contract, which is the contract forming the basis of the arbitration, is perfectly legal. The asserted illegality is not predicated on any term of that contract, nor does it arise out of the terms of that contract, but is based on facts developed at the hearing before the arbitrators. It is argued by respondent, with some merit, that where the claimed illegality thus appears it is merely factual issue and that the finding of legality by the arbitrators like other factual findings is not subject to review.

It should also be mentioned that the illegality involved in the two cited cases consisted of the violation of a statute. Here the asserted illegality lies in the vague and uncertain field of a requested court declared public policy. While there can be no doubt that, in a proper case, in the absence of statute, courts possess the power to declare contracts, trans-

which directs that a member of the Communist Party who is dedicated to that party's program of "sabotage, force, violence and the like" be reinstated to employment in a plant which produces antibiotics used by both the military and civilians is against public policy, as expressed in both federal and state laws, is therefore illegal and void and will not be enforced by the courts. With this contention we agree.

In the case of *Loving & Evans v. Blick* (1949), 33 Cal. 2d 603, this court reversed a judgment confirming an arbitrator's award of a disputed sum owing under a building contract where it appeared that only one of the partners of the contracting firm was licensed as required by statute, and that neither the other partner nor the partnership held such a license. After referring to the principles that (p. 607) "a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract" and that (p. 609) "ordinarily with respect to arbitration proceedings 'the merits of the controversy between the parties are not subject to judicial review' [citation] and that 'arbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials,'" it was held (p. 610) that the "power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise," that "Section 1281 of the Code of Civil Procedure, providing for submission to arbitration of 'any controversy . . . which arises out of a contract,' does not contemplate that the parties may provide for the arbitra-

actions and activities of individuals, associations and corporations to be illegal because in violation of public policy (*Safeway Stores v Retail Clerks etc. Assn.*,[1] 41 Cal. 2d 567, 574 [261 P.2d 721]), such public policy is such a vague and uncertain thing that the power should be exercised with restraint and only in the very clearest of cases. (*Maryland C. Co. v. Fidelity etc. Co.*, 71 Cal. App. 492, 497 [236 P. 210]; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 600 [47 P. 582, 56 Am.St.Rep. 119, 35 L.R.A. 309]; *Southern Pac. Co. v. Stibbens*, 103 Cal.App. 664, 680 [285 P. 374].) As was said in *National Auto Ins. Co. v. Winter*, 58 Cal.App. 2d 11, at p. 22 [136 P.2d 22]: "It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths."

It must also be remembered that neither the federal nor state government has seen fit to declare by statute that membership in the communist party is a crime. While the Smith Act (18 U.S.C.A., § 2385) does make the knowing advocacy of the forceful overthrow of government a crime, the later Internal Security Act of 1950 (50 U.S.C.A., § 783f) expressly provides that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of * * * any * * * criminal statute." (See *Dennis v. United States*, 341 U.S. 494 [71 S.Ct. 857, 95 L.Ed. 1137]; *Communist Party v. Peek*, 20 Cal. 2d 536 [127 P.2d 889].)

It must also be remembered that there is also a strong public policy, evidenced by statutes, operating in favor of respondent union and somewhat contrary to the uncertain public policy asserted by appellant. There is first a strong public policy in favor of arbitrations, of settling arbitra-

[1]Advance Report Citation: 41 A.C. 579, 586.

tion of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state," that (p. 611) "an unlawful transaction cannot be given legal vitality by the arbitration process," that (p. 614) "the only evidence before the trial court showed without contradiction that the contract upon which the award was based was illegal and void because of respondents' failure to comply with the licensing requirements," and that therefore that court had erred in confirming the award. And in *Franklin v. Nat-C. Goldstone Agency* (1949), 33 Cal. 2d 628, 630-633, a judgment confirming an arbitration award in favor of unlicensed contractors was likewise reversed upon the ground that the basic contract was illegal because in violation of the statutes and of "the public policy of this state."

It is at once apparent that the controversy now before us presents an even stronger case for refusal to confirm the award than was involved in the Loving & Evans and in the Franklin cases. There the illegality was held to exist in the contracts upon which the awards were based, while here the very award itself is illegal in that it orders reinstatement as an employe of one whose dedication to and active support of Communist principles and practices stands proved and unchallenged in the record. As is hereinafter shown, the true implications of knowing membership in and support of the Communist Party are no longer open to doubt, and the long overworked party line theme that communism is but a political activity has been exposed as a false and fraudulent stratagem designed particularly as a device for securing, in the free nations having government by law, legal support for the "party" in carrying on to the end of its illegal objectives.

tions, particularly labor arbitrations, speedily and with a minimum of court interference, and of making the awards of arbitrators final and conclusive. This public policy is expressed in our arbitration statutes (Code Civ. Proc., §§ 1280-1293). There is also a strong public policy expressed in the National Labor Relations Act. (29 U.S.C.A., § 151 et seq.) and in section 923 of the Labor Code of California in favor of worker organization and against employer interference and coercion.

These comments indicate the difficulty that exists in holding that it is clearly against public policy for an employer to be compelled to reinstate in a plant where some defense work is performed, a communist employee who is a mere label clerk or clerk-typist and who admittedly has never, during her employment, committed any act of sabotage or unlawfully injured the employer. We are not required to decide that question in this opinion. In the instant case the arbitrators have found that membership in the communist party was not the real reason for the discharge, but that the real reason for the discharge was to interfere with the lawful labor activities of the union. The arbitrators also found that this was a direct violation of the collective bargaining agreement. Thus the appellant, who it has been found has unlawfully violated its contract and the public policy announced in section 923 of the Labor Code, seeks to support its unlawful action by asserting that the employee was a communist, which was one of the reasons set forth in the letter of discharge, but which it has been found, was not the real reason at all. Certainly it is implicit in the collective bargaining agreement that the "just cause" for the discharge must be not only stated to the employee, but the

The Congress of the United States, in adopting the Internal Security Act of 1950, declared the dangers of the Communist movement in the following terms (Act of Sept. 23, 1950, c. 1024, Title I, § 2, 64 Stat. 987; 50 U.S.C.A. §781):

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

"(1) There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

"(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality . . .

"(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested

stated reason must be the real reason for the discharge. Where, as here, the real reason for the discharge was an attempt to interfere unlawfully with the union, the employer cannot be permitted to so interfere with the union by asserting a reason that was not asserted in good faith and did not, in fact, motivate the employer in making the discharge. What was the real reason for the discharge was obviously a question of fact for the arbitrators, and their findings on this issue is binding and conclusive on the courts.

In addition, everything said in this opinion about the waiver of the ground of falsifications in the employment application is also applicable to the present issue. Appellant knew of the employee's communist affiliations for two and a half years before it attempted to use such affiliations as an excuse for the discharge. It would be contrary to public policy, as evidenced by the statutes already mentioned, and contrary to the letter and spirit of the collective bargaining agreement, if the employer were to be permitted to sit on a known assumed cause for discharge and then assert it for the purpose of interfering unlawfully with a lawful labor activity of the union. It must be remembered that it is the union, not Doris, that is the respondent here, and it is the union's rights that were adversely and unlawfully affected by the discharge. It must be held that the finding of waiver is a finding on a question of fact, and the arbitrators' finding, for reasons already stated, is conclusive.

The order and judgment appealed from are affirmed.

Peters, P. J.

Bray, J., and Wood (Fred B.), J., concurred.

Filed January 28, 1954,
Walter S. Chisholm, Clerk.

In the Supreme Court of the State of California
in Bank
S. F. 18528

In the Matter of the Petition of Mabel Black and T. Y. Wulff, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members, for an order confirming an award in arbitration,
Petitioners and Respondents,

vs.

Cutter Laboratories (a corporation),
Respondent, Adverse Party and Appellant.

MAJORITY OPINION

Cutter Laboratories, Inc., appeals from a judgment entered upon the granting of an order confirming the award of an arbitration board. (See Code of Civ. Proc. §§ 1291-1293.) By the award, rendered by two of the three arbitrators with the third dissenting, it was held that appellant (hereinafter sometimes termed the company) had discharged one of its employes in violation of a collective bargaining agreement between appellant and the Bio-Lab Union (hereinafter sometimes called the union) of Local 225, United Office and Professional Workers of America, and that the employe was entitled to reinstatement and to back pay limited by the bargaining agreement to eight weeks regular pay less any

outside earnings or unemployment compensation received during such period. We have concluded that, upon the undisputed evidence and upon the facts found by the arbitration board, the company is correct in its contention that the arbitrators exceeded their powers, that the award is contrary to law, that it would contravene public policy for the courts of this State to enforce reinstatement of the discharged employe, and that the judgment must therefore be reversed.

From extensive findings made by the arbitration board it appears that the employer, Cutter Laboratories, Inc., with offices and laboratories located in Berkeley, manufactures and sells throughout the United States and certain foreign countries vaccines, serums, antitoxins and other antibiotics for both civilian and military use. During World War II the company was subject to stringent security control by federal authorities, and its products and processes are said to be peculiarly subject to sabotage. Since World War II the company has been under no specific contract obligation to any governmental agency to discharge employes who are "bad security risks"; any obligation to take such steps grows out of the duties it owes generally to its customers, its dealers, its employes, and its stockholders.

The Bio-Lab Union of Local 225, United Office and Professional Workers of America C.I.O., was recognized in February, 1944, by the company pursuant to a National Labor Relations Board election. It is a union "generally denominated as 'left-wing' " and it as well as the U.O.P.W.A. was expelled from the C.I.O. in March, 1950.

The discharged employe, Mrs. Doris Walker, graduated from the University of California School of Jurisprudence

in 1942, and is an active member of The State Bar of California. She was elected to Phi Beta Kappa and to the editorial board of the California Law Review. From 1942 to 1944 she was employed as an enforcement attorney with the federal Office of Price Administration in San Francisco and from 1944 to 1946 as an attorney with a firm of lawyers in the same city. She left the law firm and secured employment as a cannery worker sorting and trimming vegetables in three canneries in Oakland and San Francisco and (later in 1946) as an organizer for the Food and Tobacco & Agricultural Workers Union. She testified that she went to law school "because I was interested in becoming a labor lawyer" and that she left the law firm because her "time was spent on routine civil matters . . . and I became dissatisfied with my work and felt that I would rather take a more active role in the field in which I was interested and so I quit in order to take a job in a plant."

In October, 1946, Mrs. Walker sought employment at Cutter Laboratories and filled out an application form supplied by the company, on which under the heading of "Education" she concealed her attendance at law school, her law degree, and her admission to practice law in this State. Under the heading "Previous Employment" she concealed her entire previous employment record and showed a false employment as file clerk for six or eight months in 1939 by "John Tripp Att'y," which the company later discovered to be a fictitious name. Mrs. Walker also gave a dentist and a lawyer in San Francisco as references, but at her request their letters of recommendation to the company did not reveal her subterfuge. She states that she intentionally deceived the company because of her belief it would not em-

ploy her if she were truthful. The company hired her as label clerk in its production planning department, and in April, 1949, she became a clerk typist in the purchasing department.

At the company plant Mrs. Walker became active in union affairs and in April, 1947, was elected shop chairman and also a member of the executive board of Local 225. Late in 1948 she was elected chief shop steward; her duties as steward took her to all departments in the plant except the executive and administrative departments and primarily entailed representing the union in grievances arising under its collective bargaining agreement with the company. In the spring of 1949 she was elected president of Local 225; her term expired December 15, 1949, and a new president was elected.

Meanwhile, in May, 1946, following proceedings before the National Labor Relations Board, the company and the union entered into a contract; in January, 1947, the wage provisions thereof were opened and a ten cent hourly wage increase agreed upon. In April, 1947, Mrs. Walker had been elected shop chairman and during the same month she and another union official learned that they were being investigated by the company as to past employment, character, and Communist affiliation. In June, 1947, the union served notice of intention to amend the contract and at the same time filed with the National Labor Relations Board an unfair labor practice charge against the company based on the investigations. A week-long strike ensued in August, 1947, which was settled following the intervention of Harry Bridges and as a result of negotiation with him. June 9, 1949, the contract was again opened, solely as to wages, and

nent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California . . ."

Further evidencing the implications of membership in the Communist Party and the policy of the State in respect thereto, the Legislature has declared that (Gov. Code, § 1028): "It shall be sufficient cause for the dismissal of any public employee when such public employee advocates or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates overthrow of the Government of the United States or of any state by force or violence." (See also *Board of Education v. Wilkinson* (1954), 125 Cal. App. 2d 100.) A private employer, particularly one largely engaged in supplying manufactured products to the government, to its armed forces, and to retailers for distribution through hospitals and doctors to the public at large, should not be required by state action through its courts (see *Shelley v. Kraemer* (1948), 334 U. S. 1, 68 S. Ct. 836, 92 L.Ed. 1161; *Hurd v. Hodge* (1948), 334 U. S. 24, 68 S. Ct. 847, 92 L.Ed. 1187) to retain in or restore to employment a person who would not be entitled to state employment and who is known to have dedicated herself to the service of a foreign power and to the practice of sabotage to the end of overthrowing our government.

Graphically depictive of the nature of the Communist conspiracy and of the extremes to which it is prepared to

resort are the following statements by Mr. Justice Jackson, concurring in *Dennis v. United States* (1951), 341 U. S. 494, 564-565, 71 S. Ct. 857, 95 L.Ed. 1137, 1181: "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion.

"The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. Their strategy of stealth precludes premature or uncoordinated outbursts of violence, except, of course, when the blame will be placed on shoulders other than their own. They resort to violence as to truth, not as a principle but as an expedient. Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough.

"Force would be utilized by the Communist Party not to destroy government but for its capture. The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it

"You refused to testify under oath whether or not you were or had been a member of the South Side Professional Club of the Communist Party.

"We are convinced now, that you were and still are a member of the Communist Party, that you were a member of the Federal Workers' Branch No. 3 of the Communist Party, and that you were a member of the South Side Professional Club of the Communist Party.

"Our recent investigation of your past record has uncovered previously unknown conduct that goes far beyond a mere concealment of material facts. We have just completed a thorough investigation and have a full report upon your past activities. We realize now the importance of the facts that you concealed from us. We realize the full implications of your falsification and misrepresentations. A follow-up and investigation of the 'Labor Herald's' recent revelations has uncovered a situation far more grave than we expected.

"We are convinced now that for a number of years you have been and still are a member of the Communist Party. We are convinced beyond any question that for a number of years you have participated actively in the Communist Party's activities.

"The nature of our company's business requires more than the usual precaution against sabotage and subversion. Upon a disclosure that any employee is a member of the Communist Party, or has participated in other subversive or revolutionary activity, we conceive it to be the responsibility of management to take action.

"Confronted with such a situation, any inclination to be lenient or to grant a union official special consideration is out. In the face of your record there is no alternative open

to us except to terminate your services at once. Accordingly, you are notified now that you are discharged for the causes mentioned. You will be paid the full amount due to you promptly."

"Shortly after" the notice was read to Mrs. Walker, it was likewise read to plant employes at a meeting called by the company. At the meeting statements were made by company officials "either to the entire group or in private discussion afterward, advising employees 'to get out of that left-wing union' and telling them that 'nothing but a left-wing union would press for wage increases at this time.'" Following the discharge of Mrs. Walker negotiations between the union and the company continued, and as already mentioned a two-year contract was agreed upon on November 30, 1949; it provided for wage increases and other contract changes. The company also agreed to, and did, pending the holding of a union-shop election, join the union in urging all eligible employes and all newly-hired eligible employes to become and remain members in good standing of the union.

The arbitration board further found that on October 5, 1949, following a grievance meeting with union representatives earlier in the day and prior to discharging Mrs. Walker on October 6, officials of the company met with its attorneys and considered evidence which the attorneys had marshalled and which may be summarized as follows:

a. State Bar records showed no California lawyer named John Tripp (a name given by Mrs. Walker to the company, as a previous employer), but that there was such a lawyer with the given names of John Tripp; it developed that he was Mrs. Walker's supervisor in the O.P.A. (1942-1944).

b. A transcript of N.L.R.B. hearings of September 30 and October 1, 1948, in proceedings by discharged cannery workers, including Mrs. Walker, for reinstatement with back pay, showed a refusal by Mrs. Walker to answer the question, "are you or were you ever a member of the Communist Party?"

c. Statements to the following effect which appeared in certain of the Reports of the Joint Fact-Finding Committee on Un-American Activities in California for the years 1943, 1945, 1947, 1948 and 1949: That Mrs. Walker's O.P.A. supervisor associated with persons said to be "members of the Communist Party organization"; that "attorneys for the Communist Party are" the firm of labor lawyers by whom Mrs. Walker was employed in 1944 to 1946; reporting the identity of the Communist Political Association with the Communist Party despite a change of name "for strategic reasons May 20-23, 1944"; giving a biography of one Archie Brown, an admitted Communist Party member and a candidate for various public offices on that ticket and mentioning sponsors of his from various unions including the United Office and Professional Workers of America; and indicating that the "People's Daily World," a newspaper, is "the official organ of the Communist Party on the west coast."

d. Four issues of the "People's Daily World" contained items concerning Mrs. Walker: her employment by the labor law firm in February, 1944, was mentioned; she was listed as a 1944 alternate delegate to a State Committee of "the Communist Political Association"; and in October, 1946, a radio program was noted which she conducted on behalf of a committee "for Archie Brown for Governor . . . the Communist write-in candidate."

e. A photostatic copy of an unaddressed handwritten letter dated "7/10/46" and signed with Mrs. Walker's maiden name discussed the propriety of the introduction of a resolution on the maritime strike at the Cannery Workers Club by the writer and another, and stated that "I tried to evaluate my action, as I try to evaluate whatever I do, from the point of view of the welfare of the working class and the strengthening of the Party."

f. Two "unidentified undated documents contained biographical material" about Mrs. Walker and stated, among other things, that she was issued 1945 Communist Party membership card No. 40360, that she joined the Communist Party in 1942 and had held various positions in various clubs and sections of the party, including the "Cannery Club," that her present husband was a Communist Party member and organizer, and that in February, 1946, she listed on a Communist Party interview form the information that "she gave up law practice because it was frustrating to work with people she had to work with (namely, professional people)."

Mrs. Walker was not shown the above described evidence when she was discharged, but was confronted with it at the arbitration board hearing, and company attorneys asked her a series of questions concerning it and her Communist affiliations and activities, including the questions, "Are you now or have you ever been a member of the Communist Party?" and "Isn't it a fact, Mrs. Walker . . . that the reason why you sought employment . . . at Cutter Laboratories was because you felt and believed, and had it in mind, that by obtaining that employment at that plant you could more actively and more effectively carry on the program and the

activities of the Communist Party?" Mrs. Walker's attorney objected to the questions on the grounds, among others, that the political affiliations of an employe are immaterial and that by not acting more promptly the company had waived the Communism issue as a ground for discharge. The board overruled the objections but also announced that Mrs. Walker would not be instructed to answer the questions "if she did not care to do so, but that if she refused to answer we would draw all justifiable inferences from the refusal." Mrs. Walker thereupon refused to answer the questions as an "unwarranted invasion into my private beliefs." The evidence as to her Communist membership and acceptance of party principles, with all the implications that flow therefrom, thus stands unchallenged and uncontradicted by her and clearly supports the board's finding that the company honestly and correctly believed her to be a knowing and deliberately acting Communist.

It was further found by the board that the company's 1947 investigation of Mrs. Walker indicated that she was a Communist and also disclosed most of the omissions and falsifications in her application for employment, that "a strong case" had been made out that in 1948 the company learned of her cannery activities and of the cannery hearings, and that there was "at least a general indifference on the part of the Company about Doris Walker's activities until the autumn of 1949 and a specific indifference about obvious . . . clues to her background." The company stated that the reason they did not discharge Mrs. Walker in 1947 was because of a desire to "lean over backward" rather than to be accused of harassing union officials and because company attorneys advised that there was at that time insufficient evidence to support a discharge.

Under the provisions of the collective bargaining agreement in effect when Mrs. Walker was discharged, the company had agreed not to interfere with, restrain or coerce employes or discriminate against them because of *membership or lawful activity* in the union. It further agreed that, except for personnel reductions for lack of work or to effect economies, it would not discharge an employe "except for just cause." Both the union and the company also agreed that they will not discriminate against "a present or prospective employee or member because of race, color, creed, national origin, religious belief, or Union affiliation"; formerly "political" as well as "religious belief" was listed in this contract provision, but by negotiation the word "political" was amended out of the agreement. The board held that although removal of the word "political" seemed to authorize the practice of discrimination because of "political belief," "we are unable to conclude" that the company's agreements not to discriminate because of union activity and not to discharge except for just cause were thereby limited or modified "in such a way as to dispose of this dispute." In this connection it is to be noted that the old hoax that the Communist Party is but a political party has been effectively exposed, as is hereinafter shown in some detail.

The company at the board hearings advanced two grounds as the basis for discharging Mrs. Walker: "the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail." Although finding that the company "honestly believed all of these things," and that the "accuracy of those beliefs is estab-

the direction and control of the world Communist movement. . . .

"(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

And in the Smith Act (Act of June 25, 1948, c. 645, 62 Stat. 808; 18 U.S.C.A. § 2385) it was provided that "Whoever knowingly or willfully advocates, abets, advises, or teaches the . . . overthrowing or destroying the government of the United States or . . . of any State . . . by force or vio-

lence, or . . . Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who . . . encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such . . . assembly of persons, knowing the purposes thereof" is guilty of a crime.

More recently, in adopting the Communist Control Act of 1954 (Chapter 886, Public Law 637, approved August 24, 1954), our Congress further expressed its, and necessitates our, awareness of the true nature of the party program and methods, in these findings of fact: "Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assign-

ments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

A similar awareness was shown by the President of the United States in his State of the Union message delivered before a joint session of the Senate and the House of Representatives on January 7, 1954 (100 Congressional Record 62, H. Doc. 251), wherein he declared, "The subversive character of the Communist Party in the United States has been clearly demonstrated in many ways, including court proceedings. We should recognize by law a fact that is plain to all thoughtful citizens—that we are dealing here with actions akin to treason—that when a citizen knowingly participates in the Communist conspiracy he no longer holds allegiance to the United States."

And in this State the courts have recognized that the type of activity found by the board here to have been engaged in by Mrs. Walker—i.e., membership "in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail"—constitutes a violation of the California Criminal Syndicalism Act. (Pen. Code, §§ 11400-11402, formerly Deering's General Laws Act 8428; see *People v. McCormick* (1951), 102 Cal. App. 2d Supp. 954, 962; *People v. Chambers* (1937), 22 Cal. App. 2d 687, 709-713.)

The Legislature of California itself has found as facts, and has so declared in section 1027.5 of the Government Code, that "... (a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law ...

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement. . . .

"There is a clear and present danger, which the Legislature of the State of California finds is great and immi-

is about ready to fall of its own weight. Concerted uprising, therefore, is to await that contingency and revolution is seen, not as a sudden episode, but as the consummation of a long process."

Other instances of recognition by the courts of the clear and present danger to this country and to its institutions presented by the Communist Party and its adherents may be found in decisions upholding the provisions of the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act, (Act, June 23, 1947, c. 120, § 1 et seq., 61 Stat. 136 et seq., 29 U.S.C.A. § 141 et seq.), which deny the privilege of being chosen as exclusive bargaining agent to a union whose officers have not filed with the National Labor Relations Board their affidavits denying membership or affiliation with the Communist Party and denying belief in the overthrow of the United States Government by force (see *Communications Assn. v. Douds* (1950), 339 U. S. 382, 70 S. Ct. 674, 94 L.Ed. 925; *National Maritime Union of America v. Herzog* (D. C. 1948), 78 F. Supp. 146, affirmed 334 U. S. 854, 68 S. Ct. 1529, 92 L.Ed. 1776; *Inland Steel Co. v. National Labor Relations Board* (C. C. A. 7, 1948), 170 F. 2d 247, 264-267, affirmed 339 U. S. 382, 70 S. Ct. 674, 94 L.Ed 925), as well as in cases sustaining other legislation or Congressional inquiry directed at exposing and controlling Communist activities in this country. (See *Lawson v. United States* (C. C. A., D. C., 1949), 176 F. 2d 49, certiorari denied, 339 U. S. 934, 70 S. Ct. 663, 94 L.Ed. 1352; *United States v. Dennis* (C. C. A., 2, 1950), 183 F. 2d 201, 212-213, affirmed, *Dennis v. United States* (1951), *supra*, 341 U. S. 494, 71 S. Ct. 857, 95 L.Ed. 1137; *Barsky v. United States* (C. C. A., D. C., 1948), 167 F. 2d 241, 247, certiorari denied,

334 U. S. 843, 68 S. Ct. 1511, 92 L.Ed. 1757; *Galvan v. Press* (1953), 347 U. S. 522, 529.) In the Douds case, *supra*, the court pointed out that before enacting the Taft-Hartley Act "Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action." (P. 389 of 339 U. S.)

Also relevant are the following comments of the court in *Garner v. Board of Public Works* (1950), 98 Cal. App. 2d 493, 498, affirmed, 1951, 341 U. S. 716, 71 S. Ct. 909, 95 L.Ed. 1317, in upholding an ordinance requiring a loyalty oath for municipal employes: "One of the foundation stones of private business is that the employee must be loyal to his employer. Loyalty is implicit in the contract of hiring. No private business can long succeed without the conscientious, undivided support of its employees. The man or woman who denies allegiance to his employment is, and should be, soon separated from it . . . And, so long as the employment continues, every employer has the right at any time to ask his employee to declare his loyalty." To the same effect is the holding in *National Labor Relations Board v. Electrical Workers* (1953), 346 U. S. 464, 472, "There is no more elemental cause for discharge of an employee than disloyalty to his employer." (See also *Labor Board v. Jones & Laughlin* (1937), 301 U. S. 1, 45-46; *RKO Radio Pictures, Inc. v. Jarrico* (1954), 128 A. C. A. 201.) From the array of congressional and legislative findings which have been quoted

above, if not from the common knowledge of mankind, it must be accepted as conclusively established that a member of the Communist Party cannot be loyal to his private employer as against any directive of his Communist master.

We are of the view, further, that the type of activity engaged in by the employe here—membership in the Communist Party and sustained participation in its activities—is one which as a matter of public policy the company should not be held to have waived by its failure to discharge her earlier than it did. In the first place, it is an established principle that parties cannot be estopped from relying on defenses based on considerations of public policy, such as illegal contracts. (See *Fewel & Dawes, Inc. v. Pratt* (1941), 17 Cal. 2d 85, 91; *American Nat. Bk. v. A. G. Sommerville* (1923), 191 Cal. 364, 371.) In the second place, the employe's party membership was not shown or even asserted by her to have been an instance of past error but appears, rather, to have been the studied and calculated choice of a person of some intellectual attainment, and to have been persisted in on an active and devoted basis even at the time of the board hearings. Thus an entirely adequate ground for refusing to employ her (whether by original refusal to hire or by discharge) was a continuing one which was available to the employer at any time during its existence. In this connection it may also be noted that the employer had not only the right to protect itself and its customers against the clear and present danger of continuing a Communist Party member in its employ, but also the duty to take such action as it deemed wise to preserve order in its plant and to protect its other employes, both union and nonunion, against the same danger and the possibility of "sabotage, force, vio-

lence and the like." The company properly stated in its notice of discharge, as related above, "The nature of our company's business requires more than the usual precaution against sabotage and subversion. Upon a disclosure that any employee is a member of the Communist Party . . . we conceive it to be the responsibility of management to take action." Knowing the facts which the company knew, it is difficult to conceive of any tenable defense which it could make, or which would be entertained in this court, as against an action for damages in a personal injury or wrongful death case arising from the wilful adulteration of any of its products by Mrs. Walker if it continued her in its employ and she should thereafter take that means of party activity. That acts of sabotage by Communists are reasonably to be expected at any time such acts may be directed by the party leader is not open to question, as has already been shown.

The fact that the company was not specifically obliged by any governmental regulation to discharge Mrs. Walker affects in no wise its right to do so or the impelling public policy which militates against the order for her reinstatement; in this country, built as it has been upon the initiative and self-reliance of its citizens, the government is expected to step in only where the employer has failed or is unable to act for himself, and he is not obligated to await a governmental decree before taking steps to protect himself or to exercise his right to discharge employes who upon the established facts are dedicated to be disloyal to him, to be likewise disloyal to the American labor union they may purport to serve, and who constitute a continuing risk to both the employing company and the public depending upon the company's products.

This is not the first time that this court has been called upon to recognize and give specific effect to the public policy where its duty in the premises is clear. (See *James v. Marinship Corp.* (1944), 25 Cal. 2d 721; *Hughes v. Superior Court* (1948), 32 Cal. 2d 850, affirmed 339 U. S. 460; *Safeway Stores v. Retail Clerks etc. Assn.* (1953), 41 Cal. 2d 567, 574-575; see also *National Labor Rel. Board v. Cincinnati Chem. Wks.* (1944), 144 F. 2d 597; *National Labor Relations Board v. Kelco Corporation* (1949), 178 F. 2d 578.)

Lastly, in the light of the undisputed evidence and of the specific findings of fact made by the arbitration board, it clearly appears that the conclusional finding that Mrs. Walker was discharged because of her labor union activities is untenable. We have here an exemplication of that which Justice Jackson (in *Dennis v. United States* (1941), *supra*, 341 U. S. 494, 564, 71 S. Ct. 857, 95 L.Ed. 1137, 1181) so clearly envisaged when he said of the Communist Party: "From established policy it tolerates no deviation and no debate. It seeks members that are, or may be secreted in strategic posts in . . . industry . . . and especially in labor unions where it can compel employers to accept and retain its members," and of that to which the court referred when it stated in *Communications Assn. v. Douds* (1950), *supra*, 339 U. S. 382, 389, 70 S. Ct. 574, 94 L.Ed. 925: "Congress [in enacting the Taft-Hartley Act] had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives . . . but to make them a device by which commerce and industry might be disrupted . . ." The issue of labor union activity

herein is manifestly a false one, a subterfuge injected not to promote the cause of American labor but to further the Communist Party line. Mrs. Walker, as a Communist, was not at any time or in any of her activities truly serving the cause of an American labor union or the interests of an American laboring man; she was but doing the bidding and serving the cause of her foreign master who tolerates no deviation and no debate." Her activities, therefore, upon any reasonable view of the evidence and the specific findings of fact, were not in truth union labor activities but were Communist Party activities.

Of no small significance in this connection is the fact that at the arbitration board hearing Mrs. Walker was asked, and she refused to answer the question, "Isn't it a fact, Mrs. Walker . . . that the reason why you sought employment . . . at Cutter Laboratories was because you felt and believed, and had it in mind, that by obtaining that employment at that plant you could more actively and more effectively carry on the program and the activities of the Communist Party?" It is, we think, indisputable that if Mrs. Walker sought and obtained employment at Cutter Laboratories so that she "could more actively and more effectively carry on the program and the activities of the Communist Party," her reinstatement in that employment would serve no cause save that of the Communist conspiracy. The courts of this country by making such an order would be but aiding toward destruction of the government they are sworn to uphold. The contract between Cutter Laboratories and the Bio-Lab Union cannot be construed, and will not be enforced, to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Schauer, J.

We concur:

Shenk, J.

Edmonds, J.

Spence, J.

DISSENTING OPINION

All the members of the court agree that we are bound by the determination of the arbitrators* that for two and one-half years Doris Walker's communist affiliations were a matter of indifference to Cutter, that Cutter therefore waived her communist affiliations as a ground for discharg-

*"While there is a work stoppage and a strike in this collective bargaining history [during Doris Walker's employment], both were directed at wage and contract issues. There is no evidence of any work stoppage, strike or other interference with production, the avowed objective of which was political, philosophical, subversive or revolutionary . . .

"It is admitted that Doris Walker's conduct and the quality of her work were no different in 1949 from what they were in 1947. It is uncontradicted on the record that all of the essential facts upon which the discharge was based were in existence in 1947 and some years before. And finally it is established to our satisfaction, by admissions of the Company and by proof, that the reasons assigned in 1949 by the Company for the discharge were both known and believed by the Company in 1947.

"This state of the record raises a doubt that the Company ever took the assigned grounds for discharge seriously . . .

"Finally, it appears, by admission of the Company, that notwithstanding the 1947 investigative report, there was no further investigation until the autumn of 1949. This is inexplicable to us if there was real concern about the combination of Communist Party membership and the omissions and falsifications disclosed by the 1947 investigative report.

"From all of this we are unable to find any satisfactory excuse for the Company's delay of over two years in asserting the grounds

ing her, that it discharged her solely because of her lawful union activity, and that in doing so it violated its collective bargaining agreement with the Union. (Code Civ. Proc. §§ 1280-1293; Pacific Vegetable Oil Corp. v. CST Ltd., 29 Cal. 2d 228, 233; Sapp v. Barenfeld, 34 Cal. 2d 515, 523; Crofoot v. Blair Holding Corp., 119 Cal. App. 2d 156, 185; see Loring & Evans v. Blick, 33 Cal. 2d 603, 609.) It would seem necessarily to follow that we should affirm the judgment of the superior court confirming the award. The majority opinion holds, however, "that an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of 'sabotage, force, violence and the like' be reinstated to employment in a plant which produces antibioties used by both the military and civilians is against public policy, as expressed in both federal and state laws, is therefore illegal and void and will

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for discharge presented here. Contract relationships lose effectiveness if grievances about performance are not promptly discussed, settled or brought to an issue. This cuts both ways: unadjusted dissatisfactions of either employer or employees cumulate and exaggerate the importance of ensuing minor dissatisfactions. It seems to us that a commonplace of any 'just' system of discipline is the swift imposition of the penalty upon the heels of discovery of the offense. Under an agreement like this one, an employer should not be entitled to carry mutually known grounds for discharge in his hip pocket indefinitely for future convenient use.

"In view of the foregoing considerations, we find that the grounds asserted by the Company for the discharge were stale. . . .

"The discharge of a top Union official and negotiator at a passionate climax in the middle of a stubbornly contested wage negotiation, standing alone, raises an inference that the discharge is retaliatory in nature and designed to restrain, coerce or interfere with the employee because of lawful Union activity. And we find convincing circumstantial evidence to support this inference.

"Two things that had lain fallow appear to have come to life when the Union opened the agreement for wage adjustment in June of 1949. The Company then put into use a new form of Application for Employment which for the first time asked questions about religion and Communist affiliation. Then also, for the first time in over

not be enforced by the courts." Thus, even though an employer is indifferent to the fact that an employee is a Communist and is therefore no longer free under a collective bargaining contract to discharge him for being a Communist, it can nevertheless violate its contract not to discharge him for lawful union activity and use the fact that he is a Communist as an excuse for its unlawful action. It can do so because this court holds that the employment of a Communist poses such a threat tothe security of the country that a contract by an employer with a union to keep a known Communist in its employ is against public policy and is therefore illegal. *A fortiori* such a contract by an employer with the employee is illegal. Thus by judicial fiat, but without the temerity to declare that Communists are deprived of civil rights (see, Civ. Code, § 1556), the court abrogates not only the right of employers and unions to contract for the employment of Communists, but the right of Communists as a class to enter into binding contracts. It does so by invoking public policy in violation of clearly stated policies of the

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two years, the Company ordered a fresh investigation into Doris Walker's Communist affiliations.

"The discharge took place in a wave of heat over a radio broadcast and a newspaper advertisement, neither of which was complimentary. But they do not appear to have made any original contribution to the usual exchanges that go on during most wage negotiations.

"While the quality of Doris Walker's conduct and performance on the job remained unchanged for three years, her position of importance in the Union had progressively increased. It was only a few months before the wage negotiation opened that she was elected President of the Local; and she was a member of the Union negotiating committee. . . .

"In view of all of the foregoing considerations, we find that Doris Walker was unjustly discharged; that the reasons assigned by the Company for the discharge were not the real reasons and had been waived, and that the discharge interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation."

Legislature (Civ. Code, § 1556; Labor Code, § 923; Code Civ. Proc. §§ 1280-1293) and in a field in which Congress and the Legislature have clearly indicated their competence to deal with the problems involved.

Section 1556 of the Civil Code provides that "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." (See also, 1 Williston on Contracts [Rev. ed.] § 222, pp. 669-670.) To deny persons other than those mentioned in this section the right to enter into employment contracts is to repeal pro tanto its provisions with respect to the class of contracts of greatest importance to those who must work for a living. Even if this court were at liberty so to repeal the statute, there are compelling reasons why it should not do so.

It is true that in this case only an employment contract is involved. There is nothing in the rationale of the majority opinion, however, that limits its application to such contracts. If it is illegal to employ a Communist, is it illegal to allow a Communist unemployment benefits? If the threat of communist activity makes an employment contract with a known Communist illegal as against public policy, does it not also invalidate other contracts? Thus, can a landlord break his lease with a Communist on the ground that his building may be sabotaged? Can a buyer refuse to accept and pay for goods purchased from a Communist on the ground that they may contain cleverly concealed defects? Can a seller refuse to deliver goods sold to a Communist on the ground that they may be used to promote communist activities? Can an owner refuse to pay for construction work by a licensed contractor who is a Communist? Indeed,

can a Communist be licensed as a contractor? If contracts with Communists are illegal, cannot Communists themselves violate them with impunity?

If breaches of contract can be defended on the ground that one of the parties is a Communist, certainly a hearing will not be denied the alleged Communist on the issue of whether or not he is a Communist. The communist problem, which the court has thus injected into private litigation, may therefore dominate all such litigation and become one of the principal preoccupations of courts. To what end? Certainly private litigation does not lend itself to the formulation of a solution to the problem of what to do with Communists. It is a rash assumption that Congress and the Legislature have been inept in their consideration of the problem, or are incapable of meeting it, or that astride the "unruly horse" of public policy (National Auto Ins. Co. v. Winter, 58 Cal. App. 2d 11, 22) courts are better able to meet it.

It is obvious that Cutter cannot properly invoke public policy on its own behalf. Doris Walker's work was satisfactory and her union activities were consistent with legitimate trade-union objectives. Her presence at Cutter presented at most a threat that she might attempt to use her position for subversive activities. That risk, however, was one that Cutter itself did not consider serious enough to disqualify her for employment, and it has been materially lessened by the fact that her communism has been thoroughly exposed. As an afterthought, Cutter now uses this threat as an excuse not only for discharging her for lawful union activity in violation of its contract, but for attacking an arbitration award that it had agreed should be "final and binding"

upon it. By sanctioning these violations of Cutter's contract this court not only defeats the public policy in favor of employee organization free of employer interference and coercion (Labor Code, § 923; National Labor Relations Act, 29 U.S.C.A. § 151 et seq.) and the public policy in favor of the settlement of disputes by arbitration (Code Civ. Proc. §§ 1280-1293) but needlessly introduces confusion into a field in which Congress has already undertaken to formulate a workable policy. (50 U.S.C.A. § 781 et seq.)

It is true that there are sensitive areas in which no Communist should be employed. We cannot assume, however, that the security system established by the federal government is not adequate to protect these areas from subversive persons. As the very authorities cited in the majority opinion make clear, neither Congress in enacting subversive control legislation nor the executive department in enforcing it has been insensitive to the nation's security. To date, however, Congress has not seen fit to make mere membership in the Communist Party a crime or to prohibit persons from entering into employment or other contracts with Communists. Similarly, the executive department has not undertaken to prosecute all Communists under the Smith Act. (18 U.S.C.A. § 2385.) It is not the policy of the United States that all Communists are without legal rights and should be interned. So long as they may legally remain at large they should be allowed to earn a living. Even resident enemy aliens, whose activities have not been restricted by Congress or the President, may engage in time of war in ordinary activities and make binding contracts of employment or other contracts. (Ex Parte Kawato, 317 U. S. 69, 74; Heiler v. Goodman's Motor Express Van & S. Co.,

[N. J.] 105 Atl. 233, 235-236; Techt v. Hughes, 229 N. Y. 222, 239; State v. Darwin, [Wash.] 173 Pac. 29, 30-31.)

It must be obvious that in passing on the validity of ordinary employment contracts in litigation between private parties, courts are in no position effectively to evaluate the security factors that should determine what jobs Communists should or should not hold. In its finding of necessity for the enactment of the Internal Security Act of 1950 (50 U.S.C.A. § 781 et seq.) Congress demonstrated its awareness of the communist problem and specifically established in that act the policy of the United States with respect to the employment of Communists. It did not prohibit all hiring of Communists nor did it leave to the courts the decision as to what jobs Communists might hold. It provided instead that the Secretary of Defense should determine and designate the defense facilities in which members of Communist-action organizations should not be employed.* Cutter has not been so designated, and we may therefore assume that the employment of a Communist at Cutter poses no threat to the security of the country. I see no evidence of Congressional incompetence or of executive negligence in this respect, nor do I see any evidence of superior wisdom, facilities, or techniques available to this court that

*Section 784(a) of the Act provides that "When a Communist organization . . . is registered or there is in effect a final order of the [Subversive Activities Control] Board requiring such organization to register, it shall be unlawful— (1) For any member of such organization . . . (D) if such organization is a Communist-action organization, to engage in any employment in any defense facility." Section 784(b) provides that "The Secretary of Defense is authorized and directed to designate and proclaim . . . a list of facilities . . . with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section."

would justify its intrusion into policy making in this field. It is my opinion that we can still safely leave to the legislative branch of the government the formulation of policies for the security of the country, and I would therefore affirm the judgment.

Traynor, J.

We concur:
Gibson, C. J.
Carter, J.

Filed January 18, 1955,
William I. Sullivan, Clerk.

Appendix C.

In the
Supreme Court of the State of California

S. F. No. 18,522

In the Matter of the Petition of Mabel Black and T. Y. Wulff, in a Representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America its officers and members, for an order confirming an award in arbitration,

Petitioners and Respondents,

vs.

Cutter Laboratories (a corp.),

Respondent, Adverse Party and Appellant.

On Appeal from the Superior Court in and for the City and County of San Francisco
Superior Court No. 402,101

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the

City and County of San Francisco in the above entitled cause, be and the same is hereby reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Appellant to recover cost on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 18th day of January, 1955, and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office, this 18th day of February, A.D. 1955.

William I. Sullivan, Clerk,
By Paul Dinoia,
Deputy.

Order Due
Feb. 17, 1955

Order Denying Rehearing
S. F. No. 18,522

In the Supreme Court of the State of California
In Bank

Black, et al.,
v.
Cutter Laboratories.

Respondents' petition for rehearing denied.

Gibson, C. J.; Carter, J. and Traynor, J., are of the opinion that the petition should be granted.

Gibson,
Chief Justice.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 11th day of May, A.D. 1955.

William I. Sullivan, Clerk,
By J. M. Rogers,
Deputy Clerk.

Filed Feb. 16, 1955.
William I. Sullivan, Clerk,
By Joseph M. Rogers,
S. F. Deputy.